No. 83-6061-CFY
Status: GRANTED

Title: Jose Garcia and Francisco Garcia, Petitioners
v.
United States

Docketed:
January 6, 1984

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: White, Charles G.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jan 6 1984	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Feb 8 1984		Order extending time to file response to petition until March 9, 1984.
5	Feb 17 1984		Record filed.
6	Feb 17 1984		Certified original record, 4 volumes, received.
7	Mar 9 1984		Brief of respondent United States in opposition filed.
8	Mar 15 1984		DISTRIBUTED. March 30, 1984
10	Apr 2 1984		Petition GRANTED.
			**********
11	May 18 1984		Brief of petitioners Jose Garcia, et al. filed.
12	May 26 1984	G	Motion of petitioners to dispense with printing the joint appendix filed.
13	Jun 11 1984		Motion of petitioners to dispense with printing the joint appendix GRANTED.
15	Jun 19 1984		Order extending time to file brief of respondent on the merits until July 12, 1984.
16	Jul 10 1984		Brief of respondent United States filed.
17	Aug 8 1984		CIRCULATED.
18	Aug 10 1984		SET FOR ARGUMENT. Wednesday, October 10, 1984. (1st case)
19	Sep 10 1984	G	Motion of Robyn J. Hermann, Esq., to permit Charles G. White, Esquire, to present oral argument pro hac vice on behalf of petitioners filed.
20	Oct 1 1984		Motion of Robyn J. Hermann, Esq., to permit Charles G. White, Esquire, to present oral argument pro hac vice on behalf of petitioners GRANTED.
21	Sep 29 1984	X	Reply brief of petitioners Jose Garcia, et al. filed.
23	Oct 10 1984		ARGUED.

ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

83-6061 (4)

JOSE AND FRANCISCO GARCIA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

BY: Charles G. White
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Attorney for Petitioners
14 N.E. 1st Avenue
Miami, Florida 33132

38 pp

IN THE

SUPREME COURT OF THE UNITED STATES

JOSE AND FRANCISCO GARCIA
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17 day of January, 1984, in accordance with Rule 33 of the Rules of the Supreme Court of the United States, copies of the

1) Motion for Leave to Proceed in Forma Pauperis,
2) Petition for Writ of Certiorari, and
3) Certificate of Service,

were served upon the United States Attorney for the Southern District of Florida, 155 South Miami Ave., Miami, Florida 33130, by delivery, and upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mail.

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

BY: _____
Charles G. White
Assistant
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Attorney for Petitioner
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Miami, Florida 33132

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

JOSE AND FRANCISCO GARCIA,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the Petitioners, Jose and Francisco Garcia by his undersigned counsel, pursuant to Rule 46.1 of the Supreme Court Rules, and asks leave to file the accompanying Petition for a Writ of Certiorari in the Supreme Court of the United States without payment of costs, and to proceed in forma pauperis.

Petitioners have previously been adjudicated indigent and the Federal Public Defender has been appointed to represent them pursuant to Title 18, U.S.C., §3006A; therefore the Petitioners rely upon Title 18, U.S.C., §3006(d)(6) and have not attached the affidavit which would otherwise be required by Title 28 U.S.C., §1915(a).

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

BY: _____
Charles G. White
Assistant
Federal Public Defender
Attorney for Petitioner
14 N.E. 1st Avenue
Miami, Florida 33132

IN THE

SUPREME COURT OF THE UNITED STATES

NUMBER _____

JOSE AND FRANCISCO GARCIA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Jose and Francisco Garcia respectfully petition the Supreme Court of the United States for a Writ of Certiorari to review that portion of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit rendered and entered in Case Number 82-5048 of that Court on November 7, 1983, which affirms the judgment of the United States District Court for the Southern District of Florida.

QUESTION PRESENTED FOR REVIEW

WHETHER A PROSECUTION UNDER 18 U.S.C. §2114 REQUIRES A POSTAL NEXUS IN ORDER FOR A CONVICTION TO BE SUSTAINED.

LIST OF PARTIES TO THE PROCEEDING

The parties to this proceeding are the United States of America and Jose and Francisco Garcia

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OPINION BELOW

A copy of the opinion of the Court of Appeals, for the Eleventh Circuit rendered November 7, 1983 and entered on the same date affirming the petitioners' conviction has been published under the citation 718 F.2d 1528. A copy of the opinion is attached.

BASIS OF JURISDICTION

Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

Jose and Francisco Garcia, the petitioners, along with Ernesto Dominguez, who is not a party to these proceedings, were charged in a five count indictment with conspiracy to steal money belonging to the United States valued in excess of $100, in violation of 18 U.S.C. §371 (Count I), stealing money belonging to the United States valued in excess of $100, in violation of 18 U.S.C. §641 (Count II), robbery of money belonging to the United States with an assault involving the use of a dangerous weapon, in violation of 18 U.S.C. §2114 (Count III), possession of counterfeit notes, in violation of 18 U.S.C. §472 (Count IV), forcibly assaulting federal officers, in violation of 18 U.S.C. §111 (Count V).

On October 6, 1981 petitioners proceeded to a jury trial. Petitioners' motions for judgment of acquittal at the close of the government's case and at the close of all the evidence were denied. On October 14, 1981 the jury returned a verdict of

guilty on all counts except Count V against Francisco Garcia.

On November 17, 1981 Jose Garcia was sentenced to a term of incarceration of twenty-five (25) years on Count III, five years on Count II consecutive with Count III, five years on both Counts I and III to run concurrent with the term imposed on Count II, and the ten (10) years on Count V to run consecutive with that term imposed on Count III and concurrent to the term in Count II. According to counsel's computation, the total is thirty five (35) years and not forty (40) asserted in the Judgment and Commitment Order.

On that same date Francisco Garcia was sentenced to a term of incarceration of twenty-five (25) years on Count III and five years each for Counts I, II, and IV to run concurrently with each other and consecutively to that term of incarceration imposed in Count III for a total of thirty (30) years.

Petitioners filed a timely appeal which raised the issues that it was error for the trial judge to a) deny petitioners' motions for judgment of acquittal on Count III (18 U.S.C. §2114), b) admit the counterfeit bills, c) impose consecutive sentences for convictions under Counts II, III and V, and d) deny petitioners' motions for judgment of acquittal based on the insufficiency of the evidence. Oral argument was heard before a panel of the Eleventh Circuit Court of Appeals comprised of Judges Fay and Kravitch, with Atkins sitting by designation. The conviction was affirmed in an opinion published at 718 F.2d 1528.

It is the contention of the petitioners that the first issue listed above concerning the failure of the trial judge to enter a judgment of acquittal as to Count III should be considered by the Supreme Court. The Eleventh Circuit held that one could be convicted of a violation of 18 U.S.C. §2114 without there being a postal nexus between the money taken or its custodian. In arriving at this conclusion the dissenting opinion of Judge Mansfield from the Second Circuit case of United States v. Reid, 517 F.2d 953 (2nd Cir. 1975), was specifically adopted by the Eleventh Circuit. The Reid Court held that a postal nexus was required to convict of a violation of 18 U.S.C. §2114. Other cases have held the same way. See United States v. Rivera, 521 F.2d 125 (2nd Cir. 1975), United States v. Rivera, 513 F.2d 519 (2nd Cir. 1975) cert. denied, 423 U.S. 948 (1975). United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974). The Eleventh Circuit has clearly created a conflict between the circuits which must be resolved by the Supreme Court because of its great importance to the prosecution and defense of cases of this type. The Eleventh Circuit has authorized the use of a statute containing a mandatory twenty-five year prison term against all precedent, and the position of the Solicitor General taken in United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971), vac. & rem'd, 414 U.S. 807, 94 S. Ct. 169, 28 L. Ed. 2d 43 (1973).

STATEMENT OF FACTS

On July 22, 1981 Secret Service Agent David Holmes, accompanied by a confidential informant named Jorge Castro, met with petitioners along with co-defendant Ernesto Domingo at Douglas Park in

Miami, Florida, purportedly to buy a quantity of counterfeit money. Castro introduced Holmes to Dominguez and Francisco Garcia as the purchasers, and Dominguez asked the agent if he had the money. The agent in turn asked Dominguez if he had the counterfeit money and Dominguez told the agent that the counterfeit money was in the trunk of a white Trans-Am that the petitioners had arrived in. After "flashing" Dominguez the money he had with him, the agent said he wanted to consumate the deal at Douglas Park, but Dominguez stated that the place was "heated up" and asked that the exchange take place at another location. Dominguez then suggested Bryant Park some five blocks away.

Once at Bryant Park, Dominguez wanted to see the money again, but was refused. The agent told Dominguez that he didn't think they had any money. Dominguez responded that they did, and Francisco Garcia showed agent Holmes a "sample" $50.00 bill. Holmes agent again insisted on seeing the counterfeit money. He then turned and walked to his car.

Agent Holmes testified that suddenly Jose Garcia jumped out of the Trans-Am, pointed a semi-automatic pistol at him, and demanded his money.

Secondu after, back-up agents arrived on the scene and Jose Garcia dropped the weapon on the ground. Holmes also indicated that his car door was open and the black leather pouch was recovered at the scene. The key to the Trans-Am, which was locked, and the $50.00 bill, were recovered from Francisco Garcia, who was hit by a surveillance agent's car.

Surveillance agents responding to the scene also testified about their observations. Agent Greg Null testified that he and his partner, Thomas Grant, were a block from the meeting when they saw Agent Holmes raise his hands in a pre-arranged danger signal.

While racing to the scene Null saw Jose Garcia with a gun pointed at Agent Holmes who had his back to Jose Garcia. Holmes testified that he backed away facing Jose Garcia, as did another government witness Alex Suarez.

Agent Thomas Grant also testified that he saw Jose Garcia with a gun, which Grant recovered at the scene and handed over to Special Agent Kevin Foley. Grant also testified that he found the keys to the Trans-Am, as well as a counterfeit $50.00 bill on Francisco Garcia. This is in direct contrast to Agent Holmes' testimony, who testified that the Trans-Am was locked. Agent Grant testified that the car windows were down. Grant drove the Trans-Am to the Secret Service office in order to search it. Once at the office, the car and its trunk was searched. No counterfeit money was found. Agent Grant had been led to believe that a great deal of counterfeit money could be found by the confidential informant.

Agent Paul Hachenberry testified that after seeing the distress signal, he observed Francisco Garcia run toward the government vehicle and then run away from the scene of the arrest looking over his shoulder, with the black pouch in his hand. While the car was moving, Francisco was struck and fell to the ground, dropping the pouch.

Agent Kevin Foley testified that he saw Francisco Garcia run towards the Grand Prix, then, and run away from it. Foley also testified that the gun recovered was legally registered to Francisco Garcia, and that the confidential informant had told them that $80,000.00 in counterfeit money was available.

Both petitioners testified on their own behalf. Jose Garcia testified that two days prior to this incident he and his brother were approached by the confidential informant, Jorge Castro, a known quaalude addict, about "taking" a man he knew for his money. The scheme proposed by Castro was to have appellants show this man counterfeit $50 and $100.00 bills which Castro provided appellants. At first petitioners resisted the idea, but after Dominguez asked them to help, they agreed. Jose Garcia understood that he, his brother, and Dominguez were to hold the man while the confidential informant took his money.

On July 22, 1981 petitioners drove to Douglas Park and Dominguez met the agent while the confidential informant remained in the car. Apparently, someone didn't like the arrangements so they moved to Bryant Park, five blocks away. When they arrived at Bryant Park, Dominguez and the agent immediately began arguing about who would see whose money first. Jose Garcia hadn't seen any money at that time.

During the argument, Holmes raised his hands and then grabbed his pistol on his right leg as the other agents swarmed over him and the suspects. Jose Garcia was struck by Agent Holmes with a pistol

and then his arm was twisted behind his back. Jose Garcia strenuously denied ever having a gun at the scene.

Francisco Garcia testified that he and his brother were approached by Jorge Castro some two days prior to the incident about 'taking' a man for his money. He was given a counterfeit bill by Castro which he accepted. On July 22, 1981 Castro Dominguez and the petitioners met at Douglas Park where Dominguez and Castro made arrangements to meet at another location. While at the meeting in Bryant Park, Dominguez asked him for the bill Castro had given him and Francisco handed it to him. He in turn, gave it to the agent who then returned it to Francisco. At that point, the agents pulled into the parking lot scaring Francisco. When he turned to the side, he was struck by a moving vehicle. Francisco vehemently denied ever touching the leather pouch with the money in it. Additionally, he testified that his brother never had a gun.

Several eyewitnesses were called to testify by both sides. Defense witness Marta Pedrosa testified that on July 22, 1981 she and her father were in front of their house when two cars, speeding by her, came down the block, and then came to a screeching halt. The agents got out of their car with guns drawn, and wrestled with the petitioners. She also observed the agents kicking Jose Garcia. Ms. Pedrosa further testified that Francisco Garcia had been struck by a car, but that in contrast to the testimony of the agents, she observed nothing in his hand, such as a leather pouch. The agents

seemed to be interested in finding the key to the Trans-Am, and eventually found it in Francisco Garcia's pocket. The agent then went into the car and came out with a pistol from which he removed the clip. Ms. Pedrosa thought it had been removed from the glove compartment.

The government then called Edna Benson to testify to her observations on July 22, 1981. She testified to the circumstances surrounding her coming to court. From her testimony, it appeared that she arrived too late to make any observations relevant to the inquiry except that one of the defendants appeared to resist arrest.

After lengthy hearings on the matter, the defense was allowed to re-open its case to call Rafael Pedrosa, the father of Martha Pedrosa another eyewitness to the incident on July 22, 1981.

Mr. Pedrosa testified that on July 22, 1981, he saw the cars speeding into Bryant Park and walked over to see what was going on. From a distance of twenty feet, he observed three young men handcuffed, and one very happy agent who had found a key to an automobile which he used to open the car. The agent prior to going into the car was unarmed, but when he stepped out of the car he had a pistol from which he removed the clip, and then placed it in his belt. Mr. Pedrosa also never saw a black leather pouch similar to that entered into evidence by the government.

The government was given an extraordinary opportunity to reopen their case for the third time and called Alex Suarez to testify to what he saw in

the park on July 22, 1981 when the petitioners were arrested. He testified that he observed the agent raise his hands, back away and say "Don't shoot!" to someone, although Suarez never saw a gun. Suddenly other agents arrived on the scene to arrest the three men present. Suarez did not observe any mistreatment by the agents. However, he observed them searching the car. Suarez saw that the agent who searched the car had a revolver in his waistband, and like witness Pedrosa, Mr. Suarez saw no weapon in his hand prior to the search.

ARGUMENT

ISSUE I

THAT A PROSECUTION UNDER 18 U.S.C. §2114 REQUIRES A POSTAL NEXUS IN ORDER FOR A CONVICTION TO BE SUSTAINED

a) That the so-called plain meaning doctrine does not prohibit review of Congressional intent.

b) That Congressional intent requires a postal nexus in prosecutions of 18 U.S.C. §2114.

Title 18 United States Code, §2114 reads in pertinent part:

> Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person

> having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty five years.

That a charge under 18 U.S.C. §2114 requires some "postal nexus" before a conviction is warranted has been based upon careful consideration of the intent of Congress in enacting the 1935 amendment to §2114, Act of August 26, 1935, ch. 694, 49 Stat. 867, by both the Second and Ninth Circuits and the concession of the Solicitor General in a Seventh Circuit case. United States v. Rivera, 521 F.2d 125 (2nd Cir. 1975). United States v. Reid, 517 F.2d 953 (2nd Cir. 1975). United States v. Rivera, 513 F.2d 519 (2nd Cir. 1975) cert. denied 423 U.S. 948 (1975). United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974) cert. denied 420 U.S. 990 (1975), rehearing denied 421 U.S. 1017 (1975). United States v. Hanahan, 442 F.2d 649 (7th Cir. 1971), vac & remanded, 414 U.S. 807 (1973).

The Eleventh Circuit in holding that prosecution under 18 U.S.C. §2114 did not require a postal nexus specifically adopted the dissent of Judge Mansfield in the Reid case. United States v. Garcia, 718 F.2d 1528, 1533 (11th Cir. 1983). Judge Mansfield felt that because, in his opinion, the wording of the statute appeared clear and unambiguous there was no need to look behind the statute to better ascertain its meaning. Judge Mansfield felt that even if the intent of Congress was reviewed, there is nothing clearly indicating that Congress intended a "postal nexus" be applied.

Lastly, Judge Mansfield held that the opinion of the Solicitor General was not controlling because he disagreed with his opinion on a matter of law.[1]

Now Petitioners will present rebuttal to these contentions.

a. That the so-called plain meaning doctrine does not prohibit review of Congressional intent.

Judge Mansfield and the panel which heard oral argument in this case were particularly interested in the propriety of looking behind the statute to determine legislative intent Citing Malat v. Riddell, 383 U.S. 569 (1966), Commissioner of Internal Revenue v. Brown, 380 U.S. 563, 571-72 (1965). United States v. Oregon, 366 U.S. 643, 648 (1961), Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 395-96 (1951), Browder v. United States, 312 U.S. 335, 338 (1941), and United States v. American Trucking Assn's Inc., 310 U.S. 534, 543 (1940), language was extracted which appeared to support the "plain meaning" of the words over any other factor when considering the scope of the statute and the definitions to be attached to its language. Yet in all those cases the issue before the Court was resolved after a careful consideration of the Congressional intention that the plain meaning, and not some other meaning would be applied. The Court has applied this general principle many times.

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1. Petitioners raise, but leave to another time, the propriety of the Government having sought an indictment on this charge under the facts of this case in the face of the Solicitor General's concession and the overwhelming precedent.

In attempting to define "sale" in Commissioner v. Brown, supra the Court, after assigning the term its "plain meaning", went on to rely on legislative intent to determine the scope of a term.

> Unquestionably the courts, in interpreting a statute, have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of the meaning would lead to absurd results... or would thwart the obvious purpose of the statute.
>
> 380 U.S. at 571

The Supreme Court spoke more clearly in United States v. American Trucking Assn's Inc. when it said:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, However, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law"

> which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."
>
> 310 U.S. at 542-44

It is interesting that Judge Mansfield quoted out of context a small section of the foregoing holding, for the proposition that the "plain meaning" always prevails despite legislative intent to the contrary. This irony was noticed by the majority in Reid, 517 F.2d at 957 n. 3a.

In TVA v. Hill, 437 U.S. 153 (1977), the Court was considering whether to terminate a $100 million federally funded dam project in order to enforce the mandatory language of the Endangered Species Act of 1973. In a classic analysis of statutory construction the Court considered the "plain meaning" of the Endangered Species Act, but then consulted the legislative history to see if Congress really meant what it said. Justice Powell,

in his dissent evoked the doctrine underlying the case of Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), and the lack of clear Congressional intent for the very expensive and destructive result the majority conceded would derive from their holding. Justice Rehnquist wrote in his dissent that principles of equity should be used to obtain the best result. The attitudes of these dissenters is appropriate to the instant case because it is a criminal matter, not a civil proceeding, where leniency toward defendants is appropriate.

A federal criminal statute should be construed narrowly in order to encompass only that conduct that Congress so intended to criminalize. Dunn v. United States, 442 U.S. 100, 112 (1979); United States v. Dudley, 581 F.2d 1193, 1197 (5th Cir. 1978). Although a criminal statute must be strictly construed, it must not be construed so stricly as to defeat the clear intention of the legislature. Barrett v. United States, 423 U.S. 212, 218, (1976); Huddleston v. United States, 415 U.S. 814, 831, (1974); United States v. Cook, 384 U.S. 257, 262-63, (1966). "The principle of strict construction 'does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.'" United States v. Levy, 579 F.2d 1332, 1337 (5th Cir. 1980), cert. denied, 440 U.S. 920, (1979), quoting United States v. Bramblett, 348 U.S. 503, 510, (1955).

A basic canon of statutory construction is that words should be interpreted as taking their

ordinary and plain meaning. E.g., Perrin v. United States, 444 U.S. 37, 42, (1980). Although in interpretation of statutory language reference should first be made to the plain and literal meaning of the words, the overriding duty of a court is to give effect to the intent of the legislature. Flora v. United States, 357 U.S. 63, 65, (1958); United States v. Second National Bank of North Miami, 502 F.2d 535, 539 (5th Cir. 1974), cert. denied, 421 U.S. 912, (1975). A statute should ordinarily be interpreted according to its plain language, unless a clear contrary legislative intention is shown. United States v. Apfelbaum, 445 U.S. 115, 121 (1980).

The analysis of the Eleventh Circuit in following the old Fifth Circuit language in United States v. Scrimgeour, 636 F.2d 1019 (5th Cir. Unit B 1981) to the effect that "or" means the disjunctive always, is curious in light of the fact that the holding of that case was that "or" was "and" if that was the intent of the legislature.

Therefore, inquiry should be made into the intent of Congress when enacting the 1935 amendment to 18 U.S.C. §2114.

b) That Congressional intent requires a postal nexus in prosecutions of 18 U.S.C. §2114.

By adopting Judge Mansfield's dissent the Eleventh Circuit was presumably adopting his reasoning. Part of this reasoning pertained to the effect to be given to the Solicitor General's concession. Judge Mansfield then concluded that undue reliance was placed on that opinion. 517 F.2d at 970. Yet, each court that has considered this

matter has independently evaluated the Congressional intent and concluded that the Solicitor General was justified in his concession.

The 1935 amendment to 18 U.S.C. §2114 (which at that time was found at 18 U.S.C. §320 added the terms "or of any money or other property of the United States" to the mail matter previously covered by the statute. These changes were requested by the Postmaster General, were referred to the Committee on Post Offices and Post Roads of each House. The committee reports, of which the general language introducing the reports was quoted so approvingly by Judge Mansfield, consist almost exclusively of a letter from the Postmaster General, which is reproduced.

Post Office Department,
Office of the Postmaster General,
February 20, 1935

Hon. James M. Mead,
Chairman Committee on the Post Office and Post Roads, House of Representatives.

My Dear Mr. Mead:

The receipt is acknowledged of your letter of the 16th instant, requesting a report on H.R. 5360, a bill providing for punishment for the crime of robbing or attempting to rob custodians of Government moneys or property.

Assaults upon custodians of mail matter are punishable under section 197 of the Federal Penal Code (19 U.S.C. §320), which provides a penalty of 25 years imprisonment if the custodian is wounded or his life is put in jeopardy by the use of a dangerous weapon. If the person assaulted is a custodian of Government funds (not mail) the maximum punishment that can be imposed is imprisonment for not more than 10 years and a fine of not more than $5,000; and no penalty is provided for attempts to commit such crimes. Recent years have witnessed a substantial increase in crimes of the latter type and it is believed that section 197 of the Penal Code should be amended so as to bring within its provisions the crime of robbing or attempting to rob custodians of Government moneys. Legislation to this effect was recommended in the Postmaster General's annual report for 1933 and two bills, H.R. 6546 and H.R. 7214 were introduced and referred to

the House Judiciary Committee but neither bill was reported out by the committee. The recommendation for the passage of this legislation is renewed.

Very truly yours,
James A. Farley
Postmaster General.

H.R. Rep No. 582, 74th Cong., 1st Sess. (1935)
and
S Rep. No. 1440, 74th Cong., 1st Sess. (1935)

This letter is the only input from any federal agency contained within the committee reports. It clearly carries with it the assumption that the Postmaster General would be one of the few people interested in this Act. Surely every other agency was covered by the provisions of what is now known as 18 U.S.C. §2112. In 1935 the predecessor of this statute was found in 18 U.S.C. §99. Section 99 clearly made it a federal crime to rob someone of government property. The statute had been in effect since 1909. Clearly, the amendment to the §320 was intended to apply only to postal matters. As the Reid majority noted expanding the scope of §2114 to exclude a postal nexus "was a misguided effort on any view since the robbery of any government property had long been covered by what is now 18 U.S.C. §2112, see e.g., Act of March 2, 1867, ch. 193, 14 Stat. 557, codified in Rev.Stat. 5456; 18 U.S.C.§99 (1946 ed.), and the real importance of §320 was that its assault provisions covered all postal employees whereas the only postal employees covered in the general statute concerning assaults on federal officers, 18 U.S.C. §§253 and 254, were "post-office inspectors". 517 F.2d at 951 n. 4.

On the floor of the House of Representatives there was some discussion of the bill. 79

Cong. Rec. 8205 (1935). Congressman Truax was questioning the propriety of making a mandatory twenty-five year sentence for the proposed Act and not extending the same protection to people charged with burglary of a home. Congressman Wolcott's response addressed the jurisdictional issue raised by Mr. Truax. This exchange was cited by Judge Mansfield as evidence that Congress intended a broad bill. United States v. Reid, 517 F.2d at 969. However, after being informed by Congressman Dobbins of the intended scope and purpose of the bill, Mr. Truax made the following proposal to broaden its scope which was never adopted.

> Mr. Truax: Mr. Speaker, I will say to the gentleman from Illinois that I think we ought to have some salutory laws that will protect the Government and its property from the Wall Street bandits. 79 Cong. Rec. 8205

Congressman Dobbins, as previously noted had described completely the scope of the Act in what the Ninth Circuit characterized "as illuminating as legislative history could possibly be". United States v. Fernandez, 497 F.2d at 740. Dobbins said:

> Mr. Speaker, the gentleman from Ohio objects to the 25-year penalty provided in this bill. The penalty clause is not new legislation. If this bill is not passed, the statute will still contain the mandatory 25-year penalty.
>
> The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends that protection to mail matter in the custody its postal officials. It just includes property of the United States in addition to mail matter which is protected; and let me say there are many custodians of postal stations who have a great amount of money in their custody but little mail; for instance, in those substations where money orders are sold. If a bandit attacks those employees seeking that money, there is no way to prosecute the bandit under the present law, but if he is merely after a postal card or a letter he can be prosecuted.
>
> I think this makes a salutary change in the law. It is advocated by the Post Office Department and it seems to me there ought to be no objection to it.
>
> 79 Cong. Rec. 8205

In 1948 the Federal Penal Code was recodified and in that context, the "unambiguous" words of the statute were taken out of context by the Eleventh Circuit. As the Reid majority said:

> No Congressman could have supposed that in passing an amendment to that section proposed by the committee dealing with the postal service, he was creating a new crime with respect to government property generally.
>
> 517 F.2d at 957 n.3a

CONCLUSION

For the reasons set forth above petitioners ask this Court to vacate the conviction as to Count III of the Indictment and enter a judgment of acquittal as to that Count.

Counsel for petitioners heretofore has submitted principal grounds for, and argument butrespectfully moves this Court in its discretion to permit additional argument and amended briefs to be submitted as manifest in the necessity of justice.

THEODORE J. SAKOWITZ
FEDERAL PUBLIC DEFENDER

BY: _____
Charles G. White
Assistant
Federal Public Defender
Attorney for Defendant
14 N.E. 1st Avenue
Miami, Florida 33132

EDITOR'S NOTE

PAGES 414 thru 426 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Jose GARCIA and Francisco Garcia, Defendants-Appellants.

No. 82-5018.

United States Court of Appeals, Eleventh Circuit.

Nov. 7, 1983.

Defendants were convicted in the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., of multiple counts charging stealing and robbing money of the United States by use of a pistol, conspiracy to steal, possession of counterfeit money and assaulting a secret service agent with a loaded pistol, and they appealed. The Court of Appeals, Atkins, District Judge, sitting by designation, held that: (1) statute defining offense of assaulting or robbing any person having lawful charge, control or custody of any mail matter, money or other property of United States does not require a "postal nexus" as an essential element; (2) counterfeit notes were properly admitted into evidence; (3) evidence was sufficient to support convictions; and (4) imposition of consecutive sentences did not violate defendants' rights against double jeopardy.

Affirmed.

1. Post Office ⇐27

Statute providing, inter alia, that whoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States shall be imprisoned, does not require a "postal nexus" as an essential element; that is, offenses prohibited by that statute are not limited to robbery of mail matter and assault upon a person holding money or other property in custody of United States Post Office. 18 U.S.C.A. § 2114.

2. Statutes ⇐197

Use of disjunctive in a statute indicates that alternatives were intended.

3. Statutes ⇐217.4

Review of legislative history is only justified when a statute is inescapably ambiguous.

4. Criminal Law ⇐404(3)

Evidence, including testimony by government agents that counterfeit notes were discovered in possession of defendants, that notes were turned over to other agents, that notes were admitted into evidence, and that notes were counterfeit, was sufficient to support finding that counterfeit notes were those possessed by defendants at time of their arrest, thereby supporting their introduction into evidence in prosecution for, inter alia, knowingly and willfully and with intent to defraud, possessing and concealing forged and counterfeit Federal Reserve notes. Fed.Rules Evid.Rule 901(a), 28 U.S.C.A.

5. Criminal Law ⇐404(1), 736(1), 1153(6)

Admission of exhibits into evidence is predicated on showing that exhibit being offered is in substantially same condition as when crime was committed; that determination is to be made by trial judge, not jury, and may not be overturned except for a clear abuse of discretion.

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6. Criminal Law ⇐404(1)

Factors to be considered in making determination of admissibility of exhibits into evidence include nature of article, circumstances surrounding its preservation and custody, and likelihood of others tampering with it; upon considering such factors, if trial judge is satisfied that in reasonable probability article has not been changed in any important respect, he may permit its introduction in to evidence.

7. Assault and Battery ⇐92(3)
Conspiracy ⇐47(11)
Counterfeiting ⇐18
Robbery ⇐24.1(3)

Evidence, including testimony that first defendant took pouch containing real currency, with which government agent attempted to purchase counterfeit money from defendants, that second defendant pointed pistol at agent, that both defendants possessed counterfeit bills as show money, and that first defendant refused to conclude transaction at first park and deal was moved to second park, where he pulled gun on agent while second defendant removed money from agent's vehicle, supported findings that money was stolen, that second defendant brandished deadly weapon and that defendants were not entrapped, thereby supporting their convictions of stealing and robbing money of the United States by use of a pistol, conspiracy to steal, possession of counterfeit Federal Reserve notes and assaulting a secret service agent with a loaded pistol.

8. Criminal Law ⇐1218(3)

Where defendant was sentenced to 25 years as to count III, five years as to count II, consecutive to count III, five years as to count I and IV, concurrent with each other and concurrent with count II, and ten years as to count V, consecutive to count III, judgment and commitment order providing for a total of 40 years incarceration was correct on its face.

9. Criminal Law ⇐196

In determining, for double jeopardy purposes, whether crimes charged are the same offense, inquiry is not whether identical facts support charges; rather, test is whether each provision requires proof of a fact which other does not. U.S.C.A. Const. Amend. 5.

10. Criminal Law ⇐163

Imposition of consecutive sentences for assaulting, resisting or impeding certain officers or employees, embezzlement of public money, property or records, and assault of any person having lawful charge, control or custody of mail matter or of any money or property of the United States did not violate defendants' rights against double jeopardy. 18 U.S.C.A. §§ 111, 641, 2114; U.S.C.A. Const.Amend. 5.

11. Criminal Law ⇐163

Provided that court does not exceed legislative authorization by imposing multiple punishment for same offense, following single trial, constitutional guarantee against double jeopardy is not violated. U.S.C.A. Const.Amend. 5.

12. Criminal Law ⇐1210(1)

A legislature can specifically authorize cumulative punishment under two statutes which proscribe "same" conduct; accordingly, trial court may impose cumulative punishment under such statutes at single trial. U.S.C.A. Const.Amend. 5.

13. Indictment and Information ⇐191

When some, but not all, of elements of crime charged would support conviction of another offense, latter may be termed a "lesser offense."

14. Indictment and Information ⇐191

Lesser offense must not require some additional element not needed to constitute greater offense.

15. Indictment and Information ⇐191, 191(9)

Offenses of embezzlement of public money, property or records, and assault or robbery of any person having lawful charge, control or custody of any mail matter, money or other property of the United States, respectively, are not greater and lesser offenses. 18 U.S.C.A. §§ 641, 2114.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and ATKINS *, District Judge.

ATKINS, District Judge:

Jose Garcia and Francisco Garcia were convicted of multiple counts charging (a) stealing and robbing money of the United States by use of a pistol, (b) conspiracy to steal, (c) possession of counterfeit Federal Reserve notes and (d) assaulting a Secret Service Agent with a loaded pistol. Jose was found guilty on all counts. Francisco was convicted of all but Count V relating to the assault. The Garcias raised issues dealing with a "postal nexus" as an essential element of the property stolen; Counts II, III and V having the same elements, precluding consecutive sentences; the admissibility of the counterfeit bills; and the sufficiency of the evidence. Finding no requirement of a "postal nexus" as an essential element, the counterfeit bills were properly admitted in evidence, consecutive sentences were correctly imposed under 18 U.S.C. §§ 2114, 641 and 111, and that the evidence supports the convictions, we affirm.

* Honorable C. Clyde Atkins, U.S. District Court Judge for the Southern District of Florida, sitting by designation.

THE FACTS

The facts are not substantially in dispute.

On July 22, 1981, Special Agent K. David Holmes, posed as someone interested in buying counterfeit money with genuine currency. Accompanied by a confidential informant named Jorge Castro, Agent Holmes went to Douglas Park in Miami, Florida, to meet the individuals with whom he would conduct negotiations for the purchase of counterfeit money (T 13). Informant Castro introduced Agent Holmes to Ernesto Dominguez and Appellant Francisco Garcia (T 14) as the purchaser of the counterfeit money (T 15). Dominguez asked Holmes whether he had brought the genuine currency. Agent Holmes responded affirmatively (T 15). When Agent Holmes asked Dominguez if they had the counterfeit, Dominguez responded that the counterfeit was in the trunk of the white Trans-Am in which the defendants had arrived at Douglas Park (T 15–16). The Trans-Am was parked a few spaces away

from where Agent Holmes had parked his government vehicle.

Dominguez walked over to the Trans-Am, followed shortly thereafter by Agent Holmes (T 16). Appellant Jose Garcia was seated in the driver's seat of the Trans-Am (T 17). When Agent Holmes told Appellant Jose Garcia that he wanted to do the deal, Jose Garcia stated he was not going to count phony bills there because the "place" (Douglas Park) was "sort of heated up" (T 18). The defendants wanted to see the genuine currency before displaying the counterfeit (T 18). At that point, Agent Holmes flashed the $1,500 of government money to Dominguez, while Jose Garcia remained seated in the Trans-Am and Francisco Garcia remained standing near Agent Holmes' vehicle (T 19).

Agent Holmes returned to his vehicle, followed by Dominguez. Agent Holmes once again stated that he wanted to do the deal there, but Dominguez reiterated that the place was "heated up" and said they could do the deal in another location (T 720–21). Dominguez and Francisco Garcia returned to the Trans-Am; as the vehicle drove past, they yelled that they were going to Bryant Park (T 21).

When Agent Holmes arrived at Bryant Park, Francisco Garcia and Dominguez were standing outside the Trans-Am. Jose Garcia was seated inside the vehicle (T 37). Dominguez wanted to see the genuine currency again, but Agent Holmes refused (T 41), commenting that he did not think they had any counterfeit; he asked them to show him a sample. Francisco Garcia then gave Agent Holmes a counterfeit $50 bill to examine. Dominguez assured Agent Holmes they had $65,000 in counterfeit currency to sell. Agent Holmes once again asked to see the counterfeit and began walking to his vehicle (T 42–43).

After Agent Holmes had walked about two paces towards his vehicle, Jose Garcia jumped out of the Trans-Am holding a semi-automatic pistol. Jose Garcia pointed the pistol at Agent Holmes, chambered a round into the pistol, assumed a combat stance, gripping the pistol with both hands with his finger in the trigger, pointed the loaded, chambered pistol at Agent Holmes and screamed: "Enough of this bullshit, give me the money" (T 43). Agent Holmes raised his arms in the pre-determined distress signal and began inching his way towards his vehicle, telling Jose Garcia that he was going to get the money (T 44).

Surveillance Agent Null observed Agent Holmes with his hands in the air, the prearranged distress signal which the undercover agent was to give if his life was in danger (T 88–89). While Agents Null and Grant were racing to the scene, Agent Null observed Jose Garcia pointing the pistol at Agent Holmes (T 90). Surveillance Agent Grant also saw Jose Garcia pointing the gun at Agent Holmes (T 97).

Within seconds, Agents Null and Grant arrived and shouted at Jose Garcia to drop the gun. At that point, Jose Garcia dropped the weapon (T 44). Agent Grant recovered the weapon from the ground and disarmed it, determining that one round had been chambered into the pistol (T 99). It was registered to Francisco Garcia (T 125). After disarming Jose Garcia and putting him under arrest, Agent Null conducted a pat-down of defendant Jose Garcia and seized a $100 counterfeit bill, which he immediately turned over to Agent Foley (T 91, 124).

Agent Hackenberry was also on surveillance at Bryant Park that day. Upon see-

ing Agent Holmes raise his hands in the distress signal, he also raced to the scene and observed Francisco Garcia running towards the government vehicle (T 110). Francisco Garcia leaned into the government vehicle through the opened door on the driver's side (T 110), exited the vehicle and, looking back over his shoulder, ran towards Agent Hackenberry's vehicle, carrying the black leather pouch (T 111). As Francisco Garcia ran away from the scene, the vehicle Agent Hackenberry was driving and Francisco Garcia collided, resulting in the black pouch dropping out of Francisco Garcia's hand (T 113). After Jose Garcia had been disarmed, Agent Holmes observed that the car door of the government vehicle was open; laying next to the vehicle on the ground was the black pouch containing the "flash roll" of government money (T 46).

Agent Grant's pat-down of Francisco Garcia uncovered the trunk key to the Trans-Am and a $50 counterfeit note, which note was turned over to Agent Foley (T 102, 118). Agent Grant subsequently drove the Trans-Am to the Secret Service Miami Field Office where a search of the trunk of the vehicle revealed no counterfeit currency (T 103–04).

The Defense Testimony

Both appellants testified in their own defense, essentially disputing the government witnesses' testimony as to what had happened and claiming that they had been beaten by the agents. Jose Garcia testified that the confidential Informant Jorge Castro had proposed that they show a few counterfeit bills to a potential purchaser and steal the genuine currency which the man would bring as payment for the counterfeit (T 138, 140–41). Jose Garcia had agreed, and Informant Jorge Castro had given him a $100 counterfeit bill and had given Francisco Garcia a $50 counterfeit bill (T 142). According to Jose Garcia, the plan was simply to take the money. He denied that a pistol was used (T 143). Jose Garcia testified that on July 22, 1981, they had met the agent at Douglas Park and had later moved to Bryant Park (T 145) where there had been an argument about who would show his money first (T 148).

Jose Garcia said that he had never had a gun at the scene. (T 157). Instead, he claimed that Agent Holmes, using the agent's own weapon, had pistol-whipped Jose Garcia on the head (T 148–51). He also testified that Agent Holmes had beaten Ernesto Dominguez to force Dominguez to reveal the location of the counterfeit money (T 148).

Francisco Garcia related essentially the same story as his brother (T 183–200). He testified that Informant Jorge Castro had given him the $50 counterfeit bill (T 180–81) Francisco Garcia said that Ernesto Dominguez had displayed to Agent Holmes the $50 counterfeit and had returned it to Francisco Garcia (T 192). He further testified that the weapon which was introduced into evidence had been in the glove compartment of the Trans-Am (T 182). Although he agreed that a car had hit him, Francisco Garcia denied that he had ever possessed the pouch containing the U.S. Government money (T 193). He also testified that his brother never had a gun (T 194).

The defense also called Marta Pedrosa, who testified that on July 22, 1981, while standing outside her home, she had seen two cars speeding to the park and stopping near a white Trans-Am (T 228–30). According to Pedrosa, she ran to the park and saw the agents jumping three men and kicking them (T 233). She identified Jose Garcia and Francisco Garcia as two of the men who had been arrested and kicked (T 234). She said she had seen Francisco Garcia fall after being hit by the automobile, but stated that she had not noticed any black pouch in his hand or on the ground (T 238). She identified Agent Foley as having twisted Jose Garcia's arm, demanding to know where the money was (T 239). When the agent had found the key to the Trans-Am, he had gone into the vehicle and had come out holding an automatic pistol (T 241–42). She thought the gun had been removed from the glove compartment.

Rebuttal by the Government

On July 22, 1981, Edna Benson was in her house, which faces the park. She had noticed the people and heard screaming (T 262). She had gone to the park and saw men being arrested one of whom was struggling to avoid being handcuffed (T 263). The officers were trying to quiet him (T 264). The other young men being handcuffed were quiet. Benson saw no one hit, beat or strike those being arrested (T 265).

Surrebuttal by Defendants

After the government's rebuttal, the court permitted the defense to reopen its case (T 292–337). The defense called Rafael Pedrosa, father of Maria Pedrosa, as an eyewitness to the events of July 22, 1981.

Pedrosa testified that he saw cars speeding to Bryant Park and walked down to the park to see what had happened (T 341). He saw three young men handcuffed (T 342). One of the agents found a key to the Trans-Am, searched the car, came out of the vehicle with a pistol, removed the clip and placed it in his belt (T 343–45). Pedrosa stated that he did not see anything that had happened in the park before his arrival and that when he arrived at the park the three men were already handcuffed and one was on the ground hurt (T 358). In addition, he could not tell whether the officer who searched the Trans-Am and exited with a pistol had anything in his hands when he entered the Trans-Am (T 364). He did not see the officers strike any of the men arrested (T 365).

Sur-surrebuttal by the Government

The government then called Alex Suarez who had also been present in the park on July 22, 1981, when the appellants were arrested. He observed the agent raise his hands, back away and say, "Don't shoot!", although he never saw the gun (T 379, 387). He saw the other agents arrive on the scene and arrest the three men. He did not observe any mistreatment of the three men (T 381). He, too, observed the car being searched. He said the agent who searched the car had a weapon in his waistband before he entered the Trans-Am (T 382).

No Postal Nexus Required

[1] The threshold issue is whether 18 U.S.C. § 2114 requires a "postal nexus" as an essential element. Section 2114 provides, *inter alia* that "[W]hoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States, ... or robs any such person of mail matter, or any money or other property of the United States" shall be imprisoned.

Appellants contend that section 2114 limits the conduct punishable under its provisions to actions against the Postal Service's property or employees. We do not accept the interpretation urged by appellants. To construe section 2114 as requiring proof of a "postal nexus" defies the section's unambiguous wording that it encompasses the robbery of "mail matter, *or* any money or

other property of the United States." (emphasis added)

[2] The specific use of the disjunctive "or" after the comma demonstrates that Congress intended section 2114 to apply not only to robbery of "mail matter" but to money or other property held by an authorized person. The use of a disjunctive in a statute indicates that alternatives were intended. *United States v. Scrimgeour*, 636 F.2d 1019, 1024 (5th Cir.1981) (Unit B).

If Congress had wanted to limit the offenses prohibited by section 2114 to robbery of mail matter or an assault upon a person holding money or other property in the custody of the United States Post Office, it surely knew how to do so. Congress has repeatedly enacted laws limited to offenses with respect to "mail," "letters" or "packets." *See* Judge Mansfield's dissent in *United States v. Reid*, 517 F.2d 953, 967 (2d Cir.1975).

[3] Nor can the appellants resort to the legislative history of section 2114 for support. Review of legislative history is only justified when a statute is inescapably ambiguous. *United States v. Oregon*, 366 U.S. 643, 648, 81 S.Ct. 1278, 1281, 6 L.Ed. 575 (1961); *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 395–96, 71 S.Ct. 745, 751, 95 L.Ed. 1035 (1951). *See also Malat v. Riddell*, 383 U.S. 569, 86 S.Ct. 1030, 16 L.Ed.2d 102 (1966); *Commissioner of Internal Revenue v. Brown*, 380 U.S. 563, 571–72, 85 S.Ct. 1162, 1166, 14 L.Ed.2d 75 (1965).

Assuming arguendo that Section 2114 is ambiguous, the legislative history demonstrates the Congress understood Section 2114 to encompass more than mail matter. *United States v. Reid, supra.* As Judge Friendly concluded in his dissent:

> "... the official reports of both the House and the Senate Committees with respect to the bill disclose that, although the bill was introduced at the request of the Portmaster General and hence referred to the Committee on Post Offices and Post Roads of each House, both Committees understood its purpose to be 'to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of Government moneys.' H.R.Rep. No. 582, 74th Cong., 1st Sess. (1935); Sen.Rep. No. 1440, 74th Cong., 1st Sess. (1935).

Reid, supra, at 970.

In addition, a plain language interpretation of section 2114 produces consistency among federal statutes imposing criminal punishment for robbery of a government employee. If section 2114 is interpreted as limited to postal property, the violent attempted robbery of a person in custody of such property would carry a mandatory 25-year sentence, but by contrast, the successful robbery of a person in custody of other government money or property would be punishable by a maximum of 15 years imprisonment under section 2112 or by a maximum of 10 years as an assault under section 111 (if a deadly or dangerous weapon were used). If section 2114 is read according to its plain and unequivocal language, consistency in federal statutes relating to the offense of violent robbery of a government employee is achieved. Thus, under this construction, a violent robbery of a custodian of any government property (whether it be mail matter or other property) draws the same penalty. *See, Reid, supra*, at 970.

We are not unmindful that the Second and Ninth Circuits have held that prosecution under section 2114 for stolen property requires proof of a "postal nexus" as an essential element. *See United States v. Rivera*, 521 F.2d 125 (2d Cir.1975); *United States v. Reid*, 517 F.2d 953 (2d Cir.1975); *United States v. Fernandez*, 497 F.2d 730 (9th Cir.1974). We embrace, however, the well reasoned dissent by Judge Mansfield in *Reid* and we hold that a postal nexus is not an essential element of a crime charged under section 2114.

The Counterfeit Notes Were Properly Admitted into Evidence

[4] Appellants challenge the introduction into evidence of a counterfeit $50 note and a counterfeit $100 note in support of their convictions for knowingly and willfully and with intent to defraud, possessing and concealing forged and counterfeit Federal Reserve Notes (i.e. Count IV). We hold that the evidence at trial met the requirements for authentication and identification as required by Rule 901(a) of the Federal Rules of Evidence.

[5, 6] The admission of exhibits into evidence is predicated on a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed. That determination is to be made by the trial judge, not the jury, and may not be overturned except for a clear abuse of discretion. *Brewer v. United States*, 353 F.2d 260, 262 (8th Cir.1965) *quoting Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960). Factors to be considered in making this determination of admissibility include the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood of others tampering with it. "It is generally recognized that tangible objects become admissible in evidence only when proof of their original acquisition and subsequent custody forges their connection with the accused and the criminal offense." *Gass v. United States*, 416 F.2d 767, 770 n. 8 (D.C. Cir.1969). Upon considering such factors, if the trial judge is satisfied that in reasonable probability the article has not been changed in any important respect, he may permit its introduction in evidence. *Brewer v. United States, supra.* *Brewer* further teaches that in the absence of any evidence to the contrary, the trial judge is entitled to assume that an official would not tamper with the exhibits.

> Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.

Brewer v. United States, supra, 353 F.2d at 263, *quoting Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960).

Special Agent Foley was in charge of the investigation that led to the indictment of the appellants. Agents Grant and Null also participated in the investigation. Agent Grant testified that he had found the counterfeit $50 bill while patting down Francisco Garcia (T 101–02). Agent Foley identified Government's Exhibit 6 as the counterfeit $50 bill seized from Francisco Garcia by Agent Grant, who immediately turned the note over to Agent Foley (T 118). The bill was admitted into evidence (T 119) and Agent Foley testified as an expert that the note seized from Francisco Garcia was, in fact, counterfeit (T 119–22). Agent Null testified that he had found the counterfeit $100 bill while patting down Jose Garcia (T 90–91). Agent Foley identified Government's Exhibit 7 as the counterfeit $100 bill seized from Jose Garcia by Agent Null, who immediately turned the

note over to Agent Foley (T 122). The $100 counterfeit bill was admitted into evidence (T 123) and Agent Foley testified that the $100 note was, in fact, counterfeit (T 124).

The testimony at trial shows that the government complied with Rule 901(a) of the Federal Rules of Evidence. Through the testimony of the various special agents, the government submitted evidence sufficient to support the trial judge's finding that the counterfeit notes were those possessed by the appellant at the time of their arrests.

The appellants' convictions under Count IV are affirmed.

The Sufficiency of Evidence

The Garcias challenge the sufficiency of the evidence to support the convictions. More specifically, they argue that (a) the money was neither stolen nor was the owner deprived of its use, (b) Jose Garcia did not brandish a deadly weapon, and (c) they were entrapped. This Court must consider whether, viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942) a reasonable trier of fact could find that the evidence established the appellants' guilt beyond a reasonable doubt. *See United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982) (Unit B).

[7] The Garcias contend that the evidence failed to prove that the money was stolen or purloined or that the owner was deprived of its use as alleged in Count I and II. Appellants focus on the testimony of witnesses as to the black pouch containing the money. Agent Holmes testified that the black pouch was in the Government vehicle and that, after the arrest of Jose Garcia, he observed his car door open and the black pouch containing the flash roll of "government money," on the ground (T 46). Other agents corroborated this testimony and testified to their additional observations. Agent Hackenberry testified he saw Francisco Garcia leaning into the Government vehicle through the opened door on the driver's side (T 110). He further testified to observing Francisco Garcia exit the vehicle carrying the black pouch, which was dropped when Francisco Garcia and Agent Hackenberry's vehicle collided (T 111). Francisco Garcia disputed this testimony (T 193).

Jose Garcia argues that the evidence was insufficient, because defense witnesses contradicted the Government's version. Agents testified that Jose Garcia, standing in a combat-ready stance, pointed a loaded, chambered semi-automatic weapon at Agent Holmes (T 43–44, 90, 97). Government witness Alex Suarez testified that, although he did not see a gun, he observed Agent Holmes with arms raised and backing away, stating, "Don't shoot" (T 379, 387). The raised arms was a distress signal meaning life in jeopardy (T 44, 88–89, 110). The appellants contradicted this testimony. Both testified that no gun was used and that the weapon was in the glove compartment of the Trans-Am until removed by an agent (T 148, 150, 182). The defense called two witnesses, Marta Pedrosa and her father, Rafael Pedrosa, to support the appellants' allegations. Marta Pedrosa testified that an agent searched the Trans-Am and exited it with the pistol in his hands (T 241–42). After re-opening the defense case, Rafael Pedrosa was called, obviously on the assumption that he would corroborate his daughter's testimony. He did testify to seeing the agent who searched the Trans-Am holding a pistol in his hand after exiting the vehicle (T 343–45). When cross-examined, however, Mr. Pedrosa admitted that he could not tell whether the agent who searched the Trans-Am had anything in his hands when he entered the vehicle to search it (T 364). Further, when Alex Suarez testified as a government witness, he stated that the agent who searched the car had a weapon in his waistband prior to entering the Trans-Am (T 382). The evidence was sufficient to support the appellant's conviction under Counts I and II.

Finally, appellants contend the government failed to show that they possessed a predisposition to commit the offenses. Appellants contend that their testimony at trial supports a defense of entrapment and that their convictions should be reversed because, they argue, the government failed to prove predisposition.

The testimony presented by the government was sufficient to prove predisposition beyond a reasonable doubt. The evidence showed that Jose Garcia and Francisco Garcia both possessed counterfeit bills as show money. The testimony further showed that Jose Garcia refused to conclude the transaction at Douglas Park (T 18) and that the deal was moved to Bryant Park, where Jose Garcia pulled a gun on Agent Holmes (T 43), while Francisco Garcia removed the money from Holmes' vehicle (T 111). The testimony of both appellants contradicted that of the agents and covered facts which, if believed, may have shown inducement. However, that was a jury question. The evidence supports the verdicts.

The Consecutive Sentences Were Proper

Jose Garcia was sentenced to a total of forty (40) years incarceration: twenty-five (25) years as to Count III; five (5) years as to Count II; consecutive to Count III; five (5) years as to Counts I and IV, concurrent with each other and concurrent with Count II; and ten (10) years as to Count V, consecutive to Count III (R 2f).

Francisco Garcia was sentenced to a total of thirty (30) years incarceration: twenty-five (25) years as to Count III; five (5) years as to Counts I, II and IV, concurrent with each other and consecutive to Count III.

[8] Jose contends that his sentence of forty (40) years is incorrect. He asserts that the correct term is actually thirty-five (35) years based on his contention that Count V (whereby Jose was sentenced to a period of ten (10) years) should run concurrent with the sentences imposed for Counts I, II and IV and not consecutive to them. Jose bases this contention on *Schultz v. United States*, 384 F.2d 374 (5th Cir.1967). In *Schultz*, the Court said:

> absent clear language to the contrary, it is presumed that sentences imposed on more than one offense at the same time or at different times, will run concurrently.

Id. at 375 *quoting Subas v. Hudspeth*, 122 F.2d 85, 87 (10th Cir.1941). Jose's argument ignores the specific language of the Judgment and Commitment Order which indicates a contrary intent to imposing a concurrent sentence for Count V with Counts I, II and IV. Specifically, the Order states:

> As to Count V of the indictment, the defendant is hereby sentenced to ten (10) years in custody of the Attorney General ...; this sentence is *to run consecutive to Count III*. Defendant is *sentenced to a total of forty (40) years*.

(R 26, emphasis supplied). The Judgment and Commitment Order also provided for concurrent sentences where they were appropriate as shown by the following:

> As to Counts I and IV of the Indictment, ...; this sentence is to run concurrently with each other and concurrently with Count II.

(R 26).

It is clear that if the district court had intended for Count V to run concurrently with Counts I, II and IV, it would have included the sentence for Count V in the aforementioned provision and would not have sentenced the appellant to a *total* of forty (40) years incarceration. Accordingly, the Judgment and Commitment Order is correct on its face.

[9] The Garcias urge that the consecutive sentence imposed under Counts II, III and V violated their rights against double jeopardy under the Fifth Amendment of the United States Constitution. The guarantee embodied in the Double Jeopardy Clause "has been said to consist of three separate constitutional protections. It protects against a second prosecution for *the same offense* after acquittal. It protects against a second prosecution for *the same offense* after conviction. And it protects against multiple punishments for *the same offense*." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (emphasis supplied). In determining whether the crimes charged are "the same offense", the inquiry is not whether identical facts support such charges; rather the test to be applied is whether each provision requires proof of a fact which the other does not. *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981); *Blockburger v. United States*, 284 U.S. 299, 305, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932); *United States v. Lott*, 681 F.2d 1371, 1372 (11th Cir.1982).

[10] In the case at bar, section 2114 required proof of the fact that Agent Holmes' "life was put in jeopardy" and also proof of facts showing a "robbery." By contrast, section 111 does not require proof of facts supporting robbery or that Holmes' life was placed in jeopardy. Rather, section 111 requires proof of interference with Holmes while he was "engaged in the performance of his official duties." Thus, the *Blockburger* test is satisfied despite a substantial overlap in the proof adduced to establish the subject crimes. *See Iannelli v. United States*, 420 U.S. 770, at 785 n. 17, 95 S.Ct. 1284, at 1293 n. 17, 43 L.Ed.2d 616 (1975).

Consecutive sentences for convictions under 18 U.S.C. section 111 and section 2112 have been upheld. *United States v. Mathis*, 579 F.2d 415, 418–19 (7th Cir.1978); *United States v. Roundtree*, 527 F.2d 16, 20 (8th Cir.1975). In *Roundtree*, the defendant was charged with robbing a federal law enforcement officer of government money and assaulting the officer. The *Roundtree* Court stated: "The two offenses are separate and distinct, both of which require proof of facts that the other does not." *Id.* at 20. By analogy, convictions under section 111 and section 2114 are also separate and distinct, warranting consecutive sentences.

Under section 2114, the government must also prove that there was a "taking and carrying away by use of *force*." On the other hand, § 641 (the Count II charge) does not require the wrongful taking be accompanied by force. Clearly, section

2114 requires additional proof of facts not required by section 111 or section 641.

It follows from the above analysis, that separate charges with separate penalty provisions in distinct subchapters of the act are what confronted the trial Court.

[11, 12] Provided that the Court does not exceed the legislative authorization by imposing multiple punishment for the same offense, following a single trial, the Constitutional guarantee against double jeopardy is not violated. *Missouri v. Hunter*, — U.S. —, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983). A legislature can specifically authorize cumulative punishment under two statutes which proscribe the "same" conduct. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Accordingly, the trial court may impose cumulative punishment under such statutes at a single trial. *Missouri v. Hunter*, *supra*. In addition, although the legislative history is silent on the question of whether consecutive sentences can be imposed for violations of sections 2114 and 111, it can "be assumed ... Congress was aware of the *Blockburger* rule and legislated with it in mind." *Albernaz v. United States*, *supra*, 101 S.Ct. at 1143–44.

[13, 14] Jose also contends that the elements necessary to prove the violations charged in Counts II and V are the same as those in Count III, and are therefore "lesser included offenses" of Count III, requiring merger for the purpose of sentencing. When some, but not all, of the elements of the crime charged would support a conviction of another offense, the latter may be termed a "lesser offense." *Berra v. United States*, 351 U.S. 131, 134, 76 S.Ct. 685, 687, 100 L.Ed. 1013 (1956); *United States v. Crutchfield*, 547 F.2d 496, 500 (9th Cir. 1977). The lesser offense must not require some additional element not needed to constitute the greater offense. *Olais-Castro v. United States*, 416 F.2d 1155, 1157 (9th Cir.1969).

[15] Count V (section 111 violation) requires proof of "forcibly assaulting, resisting, opposing, impeding and interfering" with a Secret Service agent. Count III (section 2114 violation) requires proof of "putting the life of an agent in jeopardy." This element would not necessarily support a conviction for the above provision of Count V. Thus, proof that an agent's life is put in jeopardy" does not *ipso facto* prove that the defendant "forcibly assaulted, resisted, opposed, impeded and interfered" with the agent's official duties. Likewise, if the government established the element of robbery as required in section 2114 (Count III), this does not necessarily prove the element of "forcibly assaulting, resisting, opposing, impeding and interfering" with an agent in the performance of his official duties as Count V would require. Accordingly, Count V is not a lesser included offense of Count III and therefore consecutive sentences are permissible.

Appellants argue that "stealing and purloining money of the United States," in violation of section 641, is a lesser included offense of section 2114 because "the elements of section 641 must necessarily be proven to convict a defendant of section 2114." They were convicted under Count III for "knowingly and wilfully robbing $1,800 in money belonging to the United States from Secret Service Agent Holmes" and in that robbery, putting the life of Agent Holmes in jeopardy by use of a dangerous weapon. On this basis, they urge that the offenses under Counts II and

III require a merger for the purpose of sentencing.

The element of force, which is necessary to prove robbery, *Brown v. State of Alabama*, 619 F.2d 376 (5th Cir.1980), is not part of the offense of "stealing and purloining." The element of stealth is usually attributed to the latter, the antithesis of force or violence. *Crabb v. Zerbst*, 99 F.2d 562, 564 (5th Cir.1938). In *Crabb*, the court held that the statutory offense of "feloniously taking and carrying away" personalty belonging to the United States (robbery), is not identical with the offense of "stealing" property of the United States and "... the penalty provisions of the one (are not) ... affected by the other." *Id.* at 565.

The facts of this case support the position that section 2114 and section 641 are not greater and lesser offenses. *See Crabb v. Zerbst, Id.*

The convictions are AFFIRMED as to all Counts.**

** However, although Francisco was not convicted of the Count V (assault) violation, and Jose was convicted of all counts, the Judgment and Conviction read identically as to both defendants. This cause is REMANDED for entry of a corrected Judgment and Commitment for Francisco.

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ORIGINAL

No. 83-6061

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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SUPREME COURT, U.S.

JOSE AND FRANCISCO GARCIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 2114, which proscribes the assault and robbery of any person having lawful custody of any mail matter or money or property of the United States, is limited to assaults of post office employees and robbery of mail matter.

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 718 F.2d 1528.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1983. The petition for a writ of certiorari was filed on January 6, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2114 provides:

> Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

STATEMENT

Following a jury trial in the United States District court for the Southern District of Florida, petitioners were convicted on multiple counts charging possession of counterfeit currency, in violation of 18 U.S.C. 474; conspiracy, in violation of 18 U.S.C. 371; stealing money of the United States, in violation of 18 U.S.C. 641; and robbing a Secret Service Agent of money of the United States while putting his life in jeopardy through use of a dangerous weapon, in violation of 18 U.S.C. 2114. Jose Garcia was also convicted of resisting arrest by use of a deadly weapon, in violation of 18 U.S.C. 111. 1/

Each petitioner was sentenced to the mandatory 25-year term under 18 U.S.C. 2114 for robbing a government official by means of deadly force. Additionally, Jose Garcia was sentenced to a consecutive 10-year term on the resisting arrest charge, and to concurrent five-year terms on the remaining counts. Francisco Garcia was sentenced to concurrent five-year terms on the remaining counts, to run consecutively to the mandatory 25-year term. The court of appeals affirmed.

1. As summarized in the decision of the court below (Pet. App. 416-418), the evidence at trial showed that on July 22, 1981, Secret Service Agent David Holmes, posing as a person interested in purchasing counterfeit money, was introduced by an informant to Ernesto Dominguez and petitioner Francisco Garcia. When Holmes inquired of Garcia and Dominguez whether they had the counterfeit money with them, Dominguez responded that it was in the trunk of a nearby car, in which petitioner Jose Garcia was seated (id. at 416). When the agent approached the vehicle and informed Garcia that he wanted to complete the deal, Garcia responded that he was not going to display phony bills there because the place was "sort of heated-up" (id. at 417). When petitioners requested Holmes to display the genuine currency with

1/ Francisco Garcia was acquitted on the resisting arrest count.

which the agent intended to make the purchase, Holmes flashed $1,800 of government money (ibid.).

The parties then agreed to reconvene at Bryant Park, a more secure location. When Holmes arrived there, he was met by petitioners and Dominguez, who again asked to see his money. When Holmes refused and demanded first to see a sample of the counterfeit money, Francisco Garcia gave him a counterfeit $50 bill to examine and told him that they had $85,000 in counterfeit currency to sell. Holmes then asked to see more and began walking toward his car. (Pet. App. 417).

At this, Jose Garcia jumped out of his car, chambered a round in his pistol, and, with his finger on the trigger, pointed it at Holmes. He screamed, "[e]nough of this bullshit, give me the money." Holmes then raised his arms in a predetermined distress signal and began moving toward his car, telling Jose Garcia that he was going to get the money. Within seconds, other agents who had observed the distress signal arrived and ordered Jose Garcia to drop his weapon. When Garcia complied, one of the agents recovered it, unchambered the round and, after conducting a patdown search of Garcia's clothing, seized a counterfeit $100 bill. (Pet. App. 417).

As the agents were converging on the scene, Francisco Garcia ran toward Holmes' government car, removed a black leather pouch containing Holmes' government money from the vehicle, and attempted to escape on foot. However, he collided with a vehicle driven by one of the agents and droped the pouch. Upon his apprehension, a search of his person resulted in the discovery of a $50 counterfeit note. (Pet. App. 418).

2. On appeal, petitioners claimed, inter alia, that their convictions under 18 U.S.C. 2114 were improper because that section proscribes only the assault and robbery of postal service employees and property. The court of appeals held, however, "that a postal nexus is not an essential element of a crime charged under section 2114" (Pet. App. 421). Contra, United

United States v. Rivera, 521 F.2d 125 (2d Cir. 1975); United States v. Reid, 517 F.2d 953 (2d Cir. 1975); United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974). The court reasoned that "to construe section 2114 as requiring proof of a postal nexus defies the section's unambiguous wording that it encompasses the robbery of 'mail matter or any money or other property of the United States'" (Pet. App. 419-420 (emphasis in the original)). Relying upon Judge Mansfield's dissent in United States v. Reid, supra, 2/ the court held that, even if resort to Section 2114's legislative history were necessary, the official reports of both the House and Senate Committees demonstrated that "both Committees understood its purpose to be 'to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of Government money.'" Pet. App. 420 (quoting United States v. Reid, 517 F.2d at 967 (Mansfield. J., dissenting)).

Finally, the court observed that "a plain language interpretation of section 2114 produces consistency among federal statutes imposing criminal punishment for robbery of a government employee" (Pet. App. 420). The court noted (ibid.) that various statutes -- with varying penalties -- proscribe the assault of federal officials and the robbery of government property. See, e.g., 18 U.S.C. 111 (10-year penalty for assault of federal officer with dangerous weapon); 18 U.S.C. 2112 (15-year term for robbery of "any kind * * * of personal property belonging to the United States"). If Section 2114 is read "according to its plain and unequivocal language," the violent robbery of any government property -- whether mail or other property -- draws the same penalty (Pet. App. 420).

DISCUSSION

Petitioners contend (Pet. 13-21) that they were improperly

2/ The court at one point incorrectly attributed language in the Reid dissent to Judge Friendly (Pet. App. 420).

convicted under 18 U.S.C. 2114 inasmuch as that section reaches only assaults and robberies with a "postal nexus." Because the contrary holding of the court below is in conflict with the decisions of two other courts of appeals, 3/ the petition for a writ of certiorari should be granted. For the reasons set forth below, however, we submit that the decision of the lower court is correct. 4/

1. As the Court recently reiterated in Russello v. United States, No. 82-472 (Nov. 1, 1983), slip op. 4 (quoting United States v. Turkette, 452 U.S. 576, 580 (1981)), "'[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of "a clearly expressed legislative intent to the contrary, that language must be regarded as conclusive.'" 5/ Section 2114 provides that "[w]hoever assaults any person having lawful charge, control or custody of any mail matter or of any money or other property of the United States, or * * * robs any such person of mail matter * * * or other property of the United States" shall be

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3/ United States v. Rivera, 521 F.2d 125 (2d Cir. 1975); United States v. Reid, 517 F.2d 953 (2d Cir. 1975); United States v. Rivera, 513 F.2d 519 (2d Cir. 1975); United States v. Fernandez, 497 F.2d 730 (9th Cir. 1974).

4/ As petitioner observes, in Hanahan v. United States, 414 U.S. 807 (1973), we conceded that Section 2114 was intended to embrace only robberies of post offices or postal employees and took the position that, where the robbery of non-postal government property is involved, the defendant should be charged and sentenced under 18 U.S.C. 2112. On the basis of that concession, the Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for reconsideration. Ibid. Upon further reflection, we believe that the concession in Hanahan was ill-considered and, therefore, decline to adhere to that position. The fact that the government has previously taken the position that Section 2114 applies only to postal-related offenses does not preclude it from urging a more expansive interpretation of the statute now. See Barrett v. United States, 423 U.S. 212, 222 (1976).

5/ See Rubin v. United States, 449 U.S. 424, 430 (1981); Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); United States v. Apfelbaum, 445 U.S. 115, 121 (1980); Lewis v. United States, 445 U.S. 55, 60 (1980); United States v. Oregon, 366 U.S. 643, 648 (1961). See also United States v. Bass, 404 U.S. 336, 339 (1971); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-396 (1951) (Jackson, J. concurring).

imprisoned. The language of the statute plainly is not limited to robbery of mail matter or assaults upon postal service custodians of such matter. As the court below observed (Pet. App. 420), the statute proscribes the assault of "any person" in custody of government property. The covered property, moreover, is not limited to mail matter. The specific use of the disjunctive term "or" after the phrase "mail matter" and before the phrase "any money or other property of the United States" (18 U.S.C. 2114) reveals Congress's "clear intent" (Pet. App. 420) to reach assaults or robberies of anyone who is the custodian of valuables belonging to the United States. See, e.g., Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). 6/

2. Nor can it be said that the "clearly expressed legislative intent" (Russello v. United States, slip op. 4) of Section 2114 is contrary to the statute's unambiguous language so as to require that the plain language be disregarded. "If anything [the legislative history] reinforces the statute's plain, unequivocal language." United States v. Reid, 517 F.2d at 969 (Mansfield, J. dissenting).

The precursor of Section 2114, 18 U.S.C. (1934 ed.) 329, was contained in the section of the criminal code entitled "Offenses Against the Postal Service." As written, that statute proscribed assaults or robbery of persons "having custody of mail matter." In 1935, as the result of a written request by the Postmaster General, Congress amended the statute by adding the phrase "money

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6/ If Congress had intended the scope of the statute to be limited to robbery of or assaults upon postal employees or assaults or robbery of other persons having custody of postal property or monies it surely knew how to say so. As Judge Mansfield noted in his dissent in United States v. Reid, 517 F.2d at 969, Congress has repeatedly enacted laws limited in their scope to "mail," "letters," or "packets" (18 U.S.C. 1693, 1694, 1695, 1696, 1698, 1700, 1701, 1703); a "post office or any authorized depository for mail matter" (18 U.S.C. 1702); a "letter box," "mail receptacle," or "authorized depository for mail matter" (18 U.S.C. 1706); "property used by the Post Office Department" (18 U.S.C. 1707); "postal funds" (18 U.S.C. 1711); a "letter or mail carrier" (18 U.S.C. 1702); and a "postmaster" or "Postal Service Employee" (18 U.S.C. 1709).

or other property of the United States." 7/ The legislation was handled in both the House of Representatives and the Senate by the Committees on the Post Office and Post Roads. But neither the initiating request of the Postmaster General nor the reports of the two congressional committees responsible for the 1935 amendment lend any support to the proposition that the statute, as amended, was limited to postal employees or postal property. To the contrary, all parties involved in the legislative process asserted, without qualification, that the purpose of the proposed amendment was to protect all custodians of any government money or property from assault or robbery. 8/

Petitioners observe (Pet. 20-21) that, during the floor debate on the 1935 amendment in the House of Representatives, Congressman Donald C. Dobbins, a member of the House Post Office Committee, stated that "[t]he only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of postal officials, the same as it now extends that protection to mail matter in the custody of postal officials." 79 Cong. Rec. 8205 (1935). Statements made during floor debates, however, reflect at best the understanding of individual members. By contrast, "[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying the proposed

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7/ See Act of Aug. 26, 1935, ch. 694, 49 Stat. 867 et seq.

8/ The Postmaster General's letter to the House Committee on Post Offices and Post Roads stated, without limitation, that "the Penal Code should be amended so as to bring within its provisions the crime of robbing or attempting to rob custodians of Government moneys." See S. Rep. 1440, 74th Cong., 1st Sess. 1-2 (1935). The bill containing the amendment that was ultimately reported to Congress was described by the House Committee Report as one "Safeguarding Custodians of Government Moneys and Property" (H.R. Rep. 582, 74th Cong., 1st Sess. 1 (1935)) and by the Senate Committee Report as "Providing For Punishment For the Crime of Robbing or Attempting to Rob Custodians of Government Moneys or Property" (S. Rep. 1440, supra, at 1). Both reports, using identical language, explained that "[t]he purpose of the pending bill is to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of Government moneys." H.R. Rep. 582, supra, at 1; S. Rep. 1440, supra, at 1.

legislation." Zuber v. Allen, 396 U.S. 168, 186 (1969). Here, the authoritative committee reports of both Houses, including the House committee of which Congressman Dobbins was a member, are contrary to his restrictive view of the amendment. H.R. Rep. No. 582, supra, at 1; S. Rep. 1440, supra, at 1. In these circumstances, Congressman Dobbins' statement is entitled to little weight -- especially when it runs counter to the plain language of Section 2114. 9/

Moreover, the contemporaneous statement of another member of the House during the floor debate on the legislation presented a substantially different view of the legislation from the one suggested by Congressman Dobbins. Responding to a suggestion that the bill should be expanded to penalize the burglary of a private citizen's home, Congressman Wolcott stated that, to his understanding, "[t]his bill is confined to assaults on Federal law-enforcement officers. For that reason I have no objection to it. I do not want to see them federalize all the criminal laws of the States, and this bill does not do it; it merely amends the existing law with respect to assault with intent to commit robbery." 79 Cong. Rec. 8205 (1935). As construed by Representative Wolcott, therefore, the statute extended beyond

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9/ As Justice Jackson explained in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 395-396 (Jackson, J., concurring):

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared * * *. [T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.

Cf. Simpson v. United States, 435 U.S. 6, 13-14 (1978) (statement on floor of the House of Representatives, although not dispositive on statutory construction issue, was entitled to weight because the statement was in accord with the legislative rationale underlying the statute at issue, and there were no relevant passages regarding the statute in the congressional reports).

postal employees to "assaults on Federal law-enforcement officers" (ibid.). In view of this straightforward construction of the statute on the floor of the House, Congressman Dobbins's more restrictive statement provides no sound basis for limiting Section 2114 in a manner that is flatly inconsistent with its plain language. 10/

3. Nor is it of significance that, following its 1935 amendment, the statute in question remained in a subdivision of the Penal Code entitled "Offenses Against the Postal Service." See United States v. Reid, 517 F.2d at 957. The statute to which the amendment was made had been placed in that section prior to 1935 (see 18 U.S.C. (1934 ed.) 320) and Congress's amendatory action simply provided no occasion to effect a broad revision of the penal code's structure. Moreover, as noted in the Reid dissent (517 F.2d at 964), prior to its 1948 revision the penal code did not have any subdivisions classifying crimes in broad general terms such as embezzlement, theft, homicide and fraud. There was, therefore, simply no more general subdivision in which the section, as amended in 1935, could have been placed. When a recodification of the Penal Code was effected in 1948, the revisers placed the statute in a chapter designated "Robbery and Burglary" (18 U.S.C. (Supp. III 1950) 2111 et seq.), despite the fact that the code contained another chapter designated "Postal Service" (18 U.S.C. (Supp. III 1950) 1691 et seq.). Although the revisers' action "did not expand the meaning Congress had entertained in 1935" (United States v. Reid, 517 F.2d at 957), by

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10/ Even statements by a member of the congressional committee responsible for formulating legislation cannot be given effect so as to override the clear and unambiguous language of the statute. See Railroad Commission v. Chicago B. & Q. R.R., 257 U.S. 563, 589 (1922); 2A J. Sutherland, Statutory Construction, § 48.14 at 220 (4th ed. 1973). In this case, if the sole purpose of the 1935 amendment to the postal robbery statute was to extend its protection to non-mail postal property, it would have been a simple matter for the committee of which Congressman Dobbins was a member to have so limited it by the addition of language "immediately obvious to the least skillful of draftsmen." United States v. Reid, 517 F.2d at 969 (Mansfield, J., dissenting).

the same token, it surely demonstrates that the earlier placement of the statute in the section entitled "Offenses Against the Postal Sevice" is of no particular consequence for purposes of ascertaining its scope.

4. Finally, petitioners' argument (Pet. 20) that the 1935 amendment to Section 2114 should be construed as applying only to postal employees because the robbery of non-postal property was proscribed prior to 1935 by the statute now codified at 18 U.S.C. 2112 is unpersuasive. As the court below observed (Pet. App. 420), a straightforward reading of Section 2114 achieves consistency among federal statutes proscribing violent robbery of government employees: all such robberies, whether of postal employees or other officers and whether of mail or other property, result in the same 25-year mandatory penalty. By constrast, the interpretation proposed by petitioner and adopted by the Second and Ninth Circuits results in a mandatory 25-year term for assaultive robberies of post office employees (or even attempts), while successful robberies of other government workers trigger a maximum penalty of 15 years under 18 U.S.C. 2112 or 10 years if the offense is charged as an assault with a dangerous weapon under 18 U.S.C. 111. It is highly unlikely that Congress intended such seemingly pointless inconsistencies. 11/

CONCLUSION

The petition for a writ of certiorari should be granted.

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MARCH 1984

11/ Indeed, it is quite likely that the sentencing anomaly noted by the court of appeals has not been resolved precisely because a straightforward reading of Section 2114 avoids inconsistent penalties for the violent robbery of different classes of government officials, so that Congress has not appreciated that any need for corrective legislation exists.

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No. 83-6061

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSE GARCIA AND FRANCISCO GARCIA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Whether a prosecution under 18 U.S.C. § 2114 requires a postal nexus in order for a conviction to be sustained.

a) Whether the plain meaning doctrine prohibits review of congressional intent when interpreting 18 U.S.C. § 2114.

b. Whether congressional intent requires a postal nexus in prosecutions of 18 U.S.C. § 2114.

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OPINION BELOW

Jose and Francisco Garcia were convicted after a jury trial before the Honorable Eugene Spellman, United States District Court Judge for the Southern District of Florida on October 14, 1981. Trial counsel failed to raise the Question Presented herein during his Motion for Judgment of Acquittal made pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

On appeal before the Eleventh Circuit Court of Appeals, the Question Presented was raised in the brief filed with the Court and presented at oral argument. The Eleventh Circuit affirmed the convictions of petitioners in an opinion issued November 8, 1983 and published under the citation 718 F.2d 1528.

BASIS OF JURISDICTION

This case was a direct appeal to the Eleventh Circuit from a conviction after a criminal jury trial. Conviction was affirmed by the Eleventh Circuit on November 8, 1983 in an opinion published at 718 F.2d 1528.

A Petition for a Writ of Certiorari was timely filed with the Supreme Court. This Petition was granted on April 2, 1984.

Jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

APPLICABLE STATUTES

Title 18, United States Code, Section 2114 reads as follows:

> Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States,

with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

STATEMENT OF THE CASE

On July 22, 1981, Special Agent K. David Holmes, posed as someone interested in buying counterfeit money with genuine currency. Accompanied by a confidential informant named Jorge Castro, Agent Holmes went to Douglas Park in Miami, Florida, to meet the individuals with whom he would conduct negotiations for the purchase of counterfeit money. (T 13).[1] Informant Castro introduced Agent Holmes to Ernesto Dominguez and Petitioner Francisco Garcia (T 14) as the purchaser of the counterfeit money (T 15). Dominguez asked Holmes whether he had brought the genuine currency. Agent Holmes responded affirmatively (T 15). When Agent Holmes asked Dominguez if they had the counterfeit, Dominguez responded that the counterfeit was in the trunk of the white Trans-Am in which the defendants had arrived at Douglas Park (T 15-16). The Trans-Am was parked a few spaces away from where Agent Holmes had parked his government vehicle.

Dominguez walked over to the Trans Am, followed shortly thereafter by Agent Holmes (T 16). Petitioner

[1] The statement of facts presented here is almost taken verbatim from the statement of facts as described by the Eleventh Circuit in their opinion published at 718 F.2d 1528.

Jose Garcia was seated in the driver's seat of the Trans-Am (T 17). When Agent Holmes told Petitioner Jose Garcia that he wanted to do the deal, Jose Garcia stated he was not going to count phony bills there because the "place" (Douglas Park) was "sort of heated up" (T 18). The defendants wanted to see the genuine currency before displaying the counterfeit (T 18). At that point, Agent Holmes flashed the $1,800 of government money to Dominguez, while Jose Garcia remained seated in the Trans-Am and Francisco Garcia remained standing near Agent Holmes' vehicle (T 19).

Agent Holmes returned to his vehicle, followed by Dominguez. Agent Holmes once again stated that he wanted to do the deal there, but Dominguez reiterated that the place was "heated up" and said they could do the deal in another location (T 20-21). Dominguez and Francisco Garcia returned to the Trans-Am; as the vehicle drove past, they yelled that they were going to Bryant Park (T 21).

When Agent Holmes arrived at Bryant Park, Francisco Garcia and Dominguez were standing outside the Trans-Am. Jose Garcia was seated inside the vehicle (T 37). Dominguez wanted to see the genuine currency again, but Agent Holmes refused (T 41), commenting that he did not think they had any counterfeit; he asked them to show him a sample. Francisco Garcia then gave Agent Holmes a counterfeit $50 bill to examine. Dominguez assured Agent Holmes they had $85,000 in counterfeit currency to sell. Agent Holmes once again asked to see the counterfeit and began walking to his vehicle (T 42-43).

After Agent Holmes had walked about two paces toward his vehicle, Jose Garcia jumped out of the Trans-Am holding a semi-automatic pistol. Jose Garcia pointed the pistol at Agent Holmes, chambered a round into the

pistol, assumed a combat stance, gripping the pistol with both hands with his finger in the trigger, pointed the loaded, chambered pistol at Agent Holmes and screamed. "Enough of this bullshit, give me the money" (T 43). Agent Holmes raised his arms in the pre-determined distress signal and began inching his way towards his vehicle, telling Jose Garcia that he was going to get the money (T 44).

Surveillance Agent Null observed Agent Holmes with his hands in the air, the prearranged distress signal which the undercover agent was to give if his life was in danger (T 88-89). While Agents Null and Grant were racing to the scene, Agent Null observed Jose Garcia pointing the pistol at Agent Holmes (T 90). Surveillance Agent Grant also saw Jose Garcia pointing the gun at Agent Holmes (T 97).

Within seconds, Agents Null and Grant arrived and shouted at Jose Garcia to drop the gun. At that point, Jose Garcia dropped the weapon (T 44). Agent Grant recovered the weapon from the ground and disarmed it, determining that one round had been chambered into the pistol (T 99). It was registered to Francisco Garcia (T 125). After disarming Jose Garcia and putting him under arrest, Agent Null conducted a pat-down of defendant Jose Garcia and seized a $100 counterfeit bill, which he immediately turned over to Agent Foley (T 91, 124).

Agent Hackenberry was also on surveillance at Bryant Park that day. Upon seeing Agent Holmes raise his hands in the distress signal, he also raced to the scene and observed Francisco Garcia running towards the government vehicle (T 110). Francisco Garcia leaned into the government vehicle through the opened door on the driver's side (T 110), exited the vehicle and, looking back over

his shoulder, ran towards Agent Hackenberry's vehicle, carrying the black leather pouch (T 111). As Francisco Garcia ran away from the scene, the vehicle Agent Hackenberry was driving and Francisco Garcia collided, resulting in the black pouch dropping out of Francisco Garcia's hand (T 113). After Jose Garcia had been disarmed, Agent Holmes observed that the car door of the government vehicle was open; laying next to the vehicle on the ground was the black pouch containing the "flash roll" of government money (T 46).

Agent Grant's pat-down of Francisco Garcia uncovered the trunk key to the Trans-Am and a $50 counterfeit note, which note was turned over to Agent Foley (T 102, 118). Agent Grant subsequently drove the Trans-Am to the Secret Service Miami Field Office where a search of the trunk of the vehicle revealed no counterfeit currency (T 103-04).

The Defense Testimony

Both petitioners testified in their own defense, essentially disputing the government witnesses' testimony as to what had happened and claiming that they had been beaten by the agents. Jose Garcia testified that the confidential Informant Jorge Castro had proposed that they show a few counterfeit bills to a potential purchaser and steal the genuine currency which the man would bring as payment for the counterfeit (T 138, 140-141). Jose Garcia had agreed, and Informant Jorge Castro had given him a $100 counterfeit bill and had given Francisco Garcia a $50 counterfeit bill (T 142). According to Jose Garcia, the plan was simply to take the money. He denied that a pistol was used (T 143). Jose Garcia testified that on July 22, 1981, they had met the agent at Douglas Park and had later moved to Bryant Park (T 145) where there had been an argument about who would show his money first (T 148).

Jose Garcia said that he had never had a gun at the scene. (T 157). Instead, he claimed that Agent Holmes, using the agent's own weapon, had pistol-whipped Jose Garcia on the head (T 148-51). He also testified that Agent Holmes had beaten Ernesto Dominguez to force Dominguez to reveal the location of the counterfeit money (T 148).

Francisco Garcia testified that Informant Jorge Castro had given him the $50 counterfeit bill (T 180-81). Francisco Garcia said that Ernesto Dominguez had displayed to Agent Holmes the $50 counterfeit and had returned it to Francisco Garcia (T 192). He further testified that the weapon which was introduced into evidence had been in the glove compartment of the Trans-Am (T 182). Although he agreed that a car had hit him, Francisco Garcia denied that he had ever possessed the pouch containing the U.S. Government money (T 193). He also testified that his brother never had a gun (T 194).

The defense also called Marta Pedrosa, who testified that on July 22, 1981, while standing outside her home, she had seen two cars speeding to the park and stopping near a white Trans-Am (T 228-30). According to Pedrosa, she ran to the park and saw the agents jumping three men and kicking them (T 233). She identified Jose Garcia and Francisco Garcia as two of the men who had been arrested and kicked (T 234). She said she had seen Francisco Garcia fall after being hit by the automobile, but stated that she had not seen any black pouch in his hand or on the ground (T 238). She identified Agent Foley as having twisted Jose Garcia's arm, demanding to know where the money was (T 239). When the agent had found the key to the Trans-Am, he had gone into the vehicle and had come out holding an automatic pistol (T 241-42). She thought the gun had been removed from the glove compartment.

Rebuttal By The Government

On July 22, 1981, Edna Benson was in her house, which faces the park. She had noticed the people and heard screaming (T 262). She had gone to the park and saw men being arrested one of whom was struggling to avoid being handcuffed (T 263). The officers were trying to quiet him (T 264). The other young men being handcuffed were quiet. Benson saw no one hit, beat or strike those being arrested (T 265). She had arrived too late to make any relevant observations regarding the gun or the black leather pouch. (T 277).

After the government's rebuttal, the court permitted the defense to reopen its case (T 292-337). The defense called Rafael Pedrosa, father of Maria Pedrosa, as an eyewitness to the events of July 22, 1981.

Pedrosa testified that he saw cars speeding to Bryant Park and walked down to the park to see what had happened (T 341). He saw three young men handcuffed (T 342). One of the agents found a key to the Trans-Am, searched the car, came out of the vehicle with a pistol, removed the clip and placed it in his belt (T 343-45). He testified that he never saw any black leather pouch similar to that entered into evidence by the government. (T 346). Pedrosa stated that he did not see anything that had happened in the park before his arrival and that when he arrived at the park the three men were already handcuffed and one was on the ground hurt (T 358). In addition, he could not tell whether the officer who searched the Trans-Am and exited with a pistol had anything in his hands when he entered the Trans-Am (T 364). He did not see the officers strike any of the men arrested.

Sur-Surrebuttal By The Government

The government then called Alex Suarez who had also been present in the park on July 22, 1981, when the petitioners were arrested. He observed the agent raise his hands, back away and say, "Don't shoot!, although he never saw the gun (T 379, 387). He saw the other agents arrive on the scene and arrest the three men. He did not observe any mistreatment of the three men (T 381). He, too, observed the car being searched. He said the agent who searched the car had a weapon in his waistband before he entered the Trans-Am (T 382).

The petitioners, along with Ernesto Dominguez, who is not a party to these proceedings, were charged in a five count indictment with conspiracy to steal money belonging to the United States valued in excess of $100, in violation of 18 U.S.C. § 371 (Count I), stealing money belonging to the United States valued in excess of $100, in violation of 18 U.S.C. § 641 (Count II), robbery of money belonging to the United States with an assault involving the use of a dangerous weapon, in violation of 18 U.S.C. § 2114 (Count III), possession of counterfeit notes, in violation of 18 U.S.C. § 472 (Count IV), forcibly assaulting federal officers, in violation of 18 U.S.C. § 111 (Count V).

On October 6, 1981 petitioners proceeded to a jury trial. Petitioners' motions for judgment of acquittal at the close of the government's case and at the close of all the evidence were denied. On October 14, 1981 the jury returned a verdict of guilty of all counts except Count V as to Francisco Garcia.

On November 17, 1981 Jose Garcia was sentenced to a term of incarceration of twenty-five (25) hears on Count III, five years on Count II consecutive with Count III, five years on both Counts I and IV to run concurrent with

the term imposed on Count II, and the ten (10) years on Count V to run consecutive with that term imposed on Count III for a total of forty (40) years according to the Judgment and Commitment Order.

On that same date Francisco Garcia was sentenced to a term of incarceration of twenty-five (25) years on Count III and five years each for Counts I, II, and IV to run concurrently with each other and consecutively to that term of incarceration imposed in Count III for a total of thirty (30) years.

Petitioners filed a timely appeal which raised the issues that it was error for the trial judge to a) deny petitioners' motions for judgment of acquittal on Count III (18 U.S.C. § 2114), b) admit the counterfeit bills, c) impose consecutive sentences for convictions under Counts II, III and V, and d) deny petitioners' motions for judgment of acquittal based on the insufficiency of the evidence. Oral argument was heard before a panel of the Eleventh Circuit Court of Appeals comprised of Judges Fay and Kravitch, with Senior District Judge Atkins sitting by designation. The conviction was affirmed in an opinion published at 718 F.2d 1528 and a Mandate was issued.

A writ of certiorari was submitted by petitioners requesting review of that portion of the Eleventh Circuit's decision which held that no postal nexus was required to sustain a conviction under 18 U.S.C. § 2114. In affirming the conviction a direct conflict was created with other Courts of Appeal. *See United States* v. *Rivera*, 521 F.2d 125 (2nd Cir. 1975). *United States* v. *Reid*, 517 F.2d 953 (2nd Cir. 1975). *United States* v. *Rivera*, 513 F.2d 519 (2nd Cir. 1975) *cert. denied*, 423 U.S. 948 (1975). *United States* v. *Fernandez*, 497 F.2d 730 (9th Cir. 1974).

This Court granted the Writ of Certiorari on April 2, 1984.

SUMMARY OF ARGUMENT

The most important function of a court when interpreting a statute is to give effect to the intent of the enacting legislature. In order to determine Congressional intent recourse to legislative history is necessary. When a criminal statute is in issue then great care should be exercised so that only that behavior which Congress intended to criminalize is punished.

There is no rule which excludes consideration of Congressional intent because of a supposed unambiguity in the statutory language. Words may have a plain meaning when read out of context, but a different meaning when read in conjunction with the intent of Congress. The plain meaning doctrine is not favored as a rule of exclusion.

The petitioners were convicted of violations of 18 U.S.C. § 2114. The legislative history is clear that only offenses involving a postal nexus are proscribed by that statute. Although the committee reports are not clear, the statements made by Congressman Dobbins, the floor manager of the 1935 Amendment at issue here, clearly state what the bill intended to accomplish. There was never any doubt among the Congressmen considering this amendment that it was anything more than an amendment to the Postal Robbery statute. There was certainly no statement of any authority that the amendment would apply the penalty of § 2114 (a minimum 25 year sentence if the victim is wounded or placed in jeopardy by a dangerous weapon) to all lawful custodians of all government property.

ARGUMENT

This Court has never before considered the question presented in this Writ of Certiorari. At this point, the great weight of authority from the various Circuit Court

of Appeals suggests that a "postal nexus" is required before a conviction is warranted for a violation of 18 U.S.C. § 2114. *United States* v. *Rivera*, 521 F.2d 125 (2nd Cir. 1975). *United States* v. *Reid*, 517 F.2d 953 (2nd Cir. 1975). *United States* v. *Rivera*, 513 F.2d 519 (2nd Cir. 1975), *cert. denied*, 423 U.S. 948. *United States* v. *Fernandez*, 497 F.2d 730 (9th cir. 1974) *cert. denied*, 420 U.S. 990 (1975), *rehearing denied* 421 U.S. 1017 *contra*, *United States* v. *Garcia*, 718 F.2d 1528 (11th Cir. 1983). Back in 1974, the Solicitor General conceded that the legislative history required a "postal nexus." *United States* v. *Hanahan*, 442 F.2d 649 (7th Cir. 1971). *vac & remanded*, 414 U.S. 807 (1973).

The Eleventh Circuit in holding that prosecution under 18 U.S.C. § 2114 did not require a postal nexus specifically adopted the dissent of Judge Mansfield in the *Reid* case.[2] *United States* v. *Garcia*, 718 F.2d at 1533. It is the reasoning of Judge Mansfield and the Eleventh Circuit that (1) the wording of 18 U.S.C. § 2114 is clear and unambiguous, and therefore there is no need to resort to any legislative history and (2) the legislative history does not clearly indicate a need for a postal nexus. Petitioner disputes both of these contentions.

A) That The Plain Meaning Doctrine Does Not Prohibit Review Of Congressional Intent.

When interpreting statutes it is the duty of the judiciary to express the intent of the enacting legislative body. *Flora* v. *United States*, 357 U.S. 63, (1958). Sometimes

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[2]Judge Mansfield did not dissent or dispute the Government's concession on the inapplicability of § 2114 to the facts in *United States* v. *Rivera*, 521 F.2d at 127, which case was heard after the *Reid* case and considered the identical issue before this Court.

the intent of the legislative will be evident upon a literal reading of a statute's words. In almost all the cases which have interpreted federal statutes, resort was made to Congressional intent as evidenced by floor debates and committee reports. Included in this list are all the cases cited for the applicability of the plain meaning doctrine to the instant case. These cases are *Malat* v. *Riddell*, 383 U.S. 569 (1966); *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563, 571-72 (1965); *United States* v. *Aragon*, 366 U.S. 643, 648 (1961); *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 384, 395-96 (1951); *Browder* v. *United States*, 312 U.S. 335, 338 (1941); and *United States* v. *American Trucking Assn's., Inc.*, 310 U.S. 534, 543 (1940).

The plain meaning doctrine is not favored by this Court as a principle used to exclude evidence useful for the courts when interpreting statutes. This Court has said, "When aid to construction of the meaning of words, as used in the statute, is available there can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1975), quoting *United States* v. *America Trucking Assn's. supra* at 545, *Cass* v. *United States*, 417 U.S. 72 (1974). See generally Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 Col. L. Rev. 1299 (1975).

Even if the words are unambiguous, the courts will sometimes look to legislative intent in order to make sure the statute says what it is supposed to say. *TVA* v. *Hill*, 437 U.S. 153 (1977). In *TVA*, the Court was considering whether strict enforcement of the Endangered Species Act should be allowed to terminate a large scale and very expensive dam building project just before completion.

The Court first found the wording of the statute to be plain, but still sought to investigate the legislative history to look for confirmation that Congress had intended the conflicting interests of environmental concern and economic development to be balanced as they were in the statute.

The scope of a term, not its definition is sometimes at issue. *Commissioner* v. *Brown*, *supra*. In *Brown* the Court assigned a plain meaning to the word "sale," but went on to investigate legislative intent.

> Unquestionably the courts in interpreting a statute, have some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of the meaning would lead to absurd results . . . or would thwart the obvious purpose of the statute.
>
> 380 U.S. at 571.

The need to determine the intent of Congress becomes more pressing when a criminal statute is involved. A federal criminal statute should be construed narrowly in order to encompass only that conduct which Congress intended to criminalize. *Dunn* v. *United States*, 442 U.S. 100, 112 (1979). If the ambit of the statute is ambiguous the rule of lenity ought to be applied. *Bell* v. *United States*, 349 U.S. 81, 83 (1955). Naturally, the rule of lenity should "not be used in complete disregard of the purpose of the legislature." *United States* v. *Culbert*, 435 U.S. 371, 379 (1978), quoting *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977). The rule of lenity is often disregarded when an ambiguity in the scope of particular words in a statute is in conflict with clearly expressed Congressional intent to battle a particular evil or give prosecutors more effective tools for combating organized crime. *Russello* v. *United States*, ___ U.S. ___ No.

82-472 (Nov. 1, 1983). *United States* v. *Turkette*, 452 U.S. 576 (1981). *United States* v. *Apfelbaum*, 445 U.S. 115 (1980). *Perrin* v. *United States*, 444 U.S. 37 (1979). *Barrett* v. *United States*, 423 U.S. 212 (1976). *Huddleston* v. *United States*, 415 U.S. 814 (1974). In all the above cited cases, the Court was interpreting criminal statutes which were comprehensive and clearly intended to be given broad application. Consideration was always given the Congressional intent.

In *American Trucking*, *supra*, the plain meaning rule as an exclusion of evidence was repudiated. As the Court stated:

> In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.
>
> There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results. However, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no

> "rule of law" which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the test of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."
>
> 310 U.S. at 542-44

It is interesting that Judge Mansfield quoted out of context a small section of the above holding, and used it to proclaim that the plain meaning must always prevail despite legislative intent to the contrary. This irony was noted by the majority in *Reid*, 517 F.2d at 957 n.3a.

Despite the *American Trucking* case, there are some cases for which statutory wording may not appear to be ambiguous, yet needs to be clarified.[3] There are cases

---

[3] *See Commissioner* v. *Acker*, 361 U.S. 87 (1959), particularly Frankfurter's dissent. The case involved a seeming direct contradiction between the plain meeting of the statute and congressional intent. Frankfurter spoke about how the British system excluded

where a court can find no need to look at legislative intent. Before deciding that such a course ought apply in the instant case, consideration should be given to the words of Felix Frankfurter:

> Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning . . . If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness.
>
> Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Col. L. Rev. 527, 528 (1947)

In the instant case, petitioners are entitled to have this Court consider their claim that Congress never intended to bring their actions within the ambit of § 2114.[4] The plain meaning doctrine as a means of ignoring Congressional intent is no longer the law.

---

evidence of Parliamentary intent from its statutory interpretations and quoting from *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48 (1928) said:

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.
>
> 361 U.S. at 95

[4] Petitioners do not concede the nonambiguity of 18 U.S.C. § 2114. While the appearance of the disjunctive may appear to clearly mean two separate concepts it is necessary to study Congress' limitations intended on those meanings. *See* Nutting, *The Ambiguity of Unambiguous Statutes*, 24 Minn. L. Rev. 509 (1940).

B) That Congressional Intent Requires A Postal Nexus In Prosecutions Of 18 U.S.C. § 2114

Prior to 1935, the predecessor statute to 18 U.S.C. § 2114 read as follows:

> Whoever shall assault any person having lawful charge, control or custody of any mail matter, with intent to rob, steal or purloin such mail matter or any part thereof, or shall rob any person of such mail or any part thereof, shall for a first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a deadly weapon, or for a subsequent offense, shall be imprisoned twenty-five years. Act of March 4, 1909, Ch. 321, § 197, 35 Stat. 1126.

The 1935 amendment to 18 U.S.C. § 2114, which at that time was found at 18 U.S.C. § 320, added the terms "or of any money or other property of the United States" to the mail matter previously covered by the statute. These changes were requested by the Postmaster General, were referred to the Post Office Committees of each House. The committee reports, of which the general language introducing the reports was quoted so approvingly by Judge Mansfield, consist almost exclusively of a letter from the Postmaster General, which is reproduced.

Post Office Department,
Office of the Postmaster General,
February 20, 1935

Hon. James M. Mead,
Chairman Committee on the Post Office and Post Roads,
House of Representatives.

My Dear Mr. Mead:

The receipt is acknowledged of your letter of the 16th instant, requesting a report on H.R. 5360, a bill providing

for punishment for the crime of robbing or attempting to rob custodians of Government moneys or property.

Assaults upon custodians of mail matter are punishable under section 197 of the Federal Penal Code (18 U.S.C. § 320), which provides a penalty of 25 years imprisonment if the custodian is wounded or his life is put in jeopardy by the use of a dangerous weapon. If the person assaulted is a custodian of Government funds (not mail) the maximum punishment that can be imposed is imprisonment for not more than 10 years and a fine of not more than $5,000; and no penalty is provided for attempts to commit such crimes. Recent years have witnessed a substantial increase in crimes of the latter type and it is believed that section 197 of the Penal provisions the crime of robbing or attempting to rob custodians of Government moneys. Legislation to this effect was recommended in the Postmaster General's annual report for 1933 and two bills, H.R. 6546 and H.R. 7214 were introduced and referred to the House Judiciary Committee but neither bill was reported out by the committee. The recommendation for the passage of this legislation is renewed.

Very truly yours,
James A. Farley
Postmaster General

H.R. Rep. No. 582, 74th Cong., 1st Sess. (1935)
and
S. Rep. No. 1440, 74th Cong., 1st Sess. (1935)

This letter is the only input from any federal agency contained within the committee reports. It clearly carries with it the assumption that the Postmaster General would be one of the few people interested in this Act. Surely every other agency was covered by the provisions

of what is now known as 18 U.S.C. § 2112. In 1935 the predecessor of this statute was found in 18 U.S.C. § 99. Section 99 clearly made it a federal crime to rob someone of government property. The statute had been in effect since 1909. Clearly, the amendment to the § 320 was intended to apply only to postal matters. As the *Reid* majority noted expanding the scope of § 2114 to exclude a postal nexus "was a misguided effort on any view since the robbery of any government property had long been covered by what is now 18 U.S.C. § 2112, see *e.g.*, Act of March 2, 1867, ch. 193, 14 Stat. 557, codified in Rev.Stat. 5456; 18 U.S.C. § 99 (1946 ed.), and the real importance of § 320 was that its assault provisions covered all postal employees whereas the only postal employees covered in the general statute concerning assaults on federal officers, 18 U.S.C. §§ 253 and 254, were "post-office inspectors". 517 F.2d at 951 n.4.

Prior to 1935 there was absolutely no doubt that 18 U.S.C. § 320 applied only to postal mail and its lawful custodians. The ancestors to § 2114 go all the way back to 1792.[5] There has been litigation over whether in certain cases the government had proven that the victim was an authorized custodian of mail matter sufficient to bring his actions within the statute. *Jones* v. *United States*, 72 F.2d 873 (7th Cir. 1934). *Randazzo* v. *United States*, 300 F. 794 (8th Cir. 1924). *United States* v. *Reeves*, 38 F. 404 (C.C.W.D. Texas 1889). Likewise, there has been litigation on whether money and postage stamps constituted mail matter before the 1935 Amendment. *Kelly* v. *United States*, 138 F.2d 489 (9th Cir. 1943). *Norton* v. *Zerbst*, 183 F.2d 677 (10th Cir. 1936). Obviously, when the Postmas-

---

[5] *See United States* v. *Spears*, 449 F.2d 946, 950-54 (D.C. Cir. 1971) for excellent history of postal robbery statute.

ter General wrote to Congressman Mead, he wanted a statute which protected all his employees with those extraordinary protections historically afforded to postal employees and the Post Office.

Both the government and the Eleventh Circuit argue that the disjunctive "or" eliminates all ambiguity and conclusively proves that Congress intended to significantly increase the scope of the statute's proscriptions. Referral to the Congressional Record will reveal why the disjunctive was used. Congressman Dobbins, who was the floor manager of the bill, and had worked on it in the House Post Office Committee said:

> The trouble with the language as originally written "custody of mail matter, money, or other property of the United States" is that it might limit the offense to mail matter of the United States, whereas it is designed to include within the protection of the section all mail matter, whether it belongs to the United States or is mail belonging to a foreign citizen and is temporarily in the custody of the United States while being in the United States mails.
>
> 79 Cong. Rec. 7875

As can be seen from Congressman Dobbins' comments, the original bill did not use a disjunctive. A disjunctive was only used because of the Committee's desire to increase the scope of the original bill to include foreign mail by adding the "or". See 79 Cong. Rec. 9380, when the bill was read with amendments and passed.

At another time, Congressman Dobbins described completely the scope of the Act in what the Ninth Circuit characterized "as illuminating as legislative history could possibly be". *United States* v. *Fernandez*, 497 F.2d at 740.

> Mr. Speaker, the gentleman from Ohio objects to the 25-year penalty provided in this bill. The penalty

> clause is not legislation. If this bill is not passed, the statute will still contain the mandatory 25-year penalty.
>
> The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends that protection to mail matter in the custody of its postal officials. It just includes property of the United States in addition to mail matter which is protected; and let me say there are many custodians of postal stations who have a great amount of money in their custody but little mail; for instance in those substations where money orders are sold. If a bandit attacks those employees seeking that money, there is no way to prosecute the bandit under the present law, but if he is merely after a postal card of a letter he can be prosecuted.
>
> I think this makes a salutary change in the law. It is advocated by the Post Office Department and it seems to be there ought to be no objection to it.
>
> 79 Cong. Rec. 8205

There was more debate. Congressman Truax was questioning the propriety of making a mandatory twenty-five year sentence for the proposed Act and not extending the same protection to people charged with burglary of a home. Congressman Wolcott's response addressed the jurisdictional issue raised by Mr. Truax. This exchange was cited by Judge Mansfield as evidence that Congress intended a broad bill. *United States* v. *Reid*, 517 F.2d at 969. However, after being informed by Congressman Dobbins of the intended scope and purpose of the bill, Mr. Truax made the following proposal to broaden its scope which was never adopted.

> Mr. Truax: Mr. Speaker, I will say to the gentleman from Illinois that I think we ought to have some

> salutory laws that will protect the Government and its property from the Wall Street bandits.
>
> 79 Cong. Rec. 8205

While humor may be misplaced in the Halls of Congress it certainly exists albeit in a drier form than prevails in more colloquial settings. Mr. Truax never did submit an amendment such as he advocated despite being invited to do so by Mr. Dobbins. Clearly Mr. Truax's tongue was in his cheek during this exchange.

The comments of the floor manager of a bill in Congress are entitled to considerable weight if the words are consistent with the stated purpose of the proposed law. *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978). In *Simpson*, the bill in question never went through committee hearings and the only statement of its purpose was offered on the floor by the Congressman who introduced it. In the instant case, Congressman Dobbins interpreted for his fellows congressmen what the Committee had discussed relative to the wording of the amendment and the intent of the Committee. He made it clear that he was working closely with counsel from the Post Office. 79 Cong. Rec. 8205. Most of the other congressmen who contributed to the debate agreed that the statutory construction was practically the worst ever seen. 79 Cong. Rec. 7875.

In 1935, 18 U.S.C. § 320 was located in the section of the Code entitled Offenses Against the Post Office. *United States* v. *Reid*, 517 F.2d at 957. In all the codifications back through to 1792 the ancestors of 18 U.S.C. § 2114 were considered exclusively postal crimes.

The Revisors of the Code in 1948 transferred § 320 to the Chapter titled Robbery and Burglary. Act of June 25, 1948, ch. 645, 62 stat. 797. The 1948 Revision was not

designed to create new crimes. *United States* v. *Reid*, *id.* "the general purpose of the new Code was to "codify and revise . . . The original intent of Congress is preserved. *United States* v. *Cook*, 384 U.S. 257, 260 (1966). *Morissette* v. *United States*, 342 U.S. 246, 266-69 n.28 (1952). *See also*, *United States* v. *Reid*, *supra* at 957-585 for a discussion of the Brown Commission comments on the proposed New Federal Criminal Code and Senator McClellan's memorandum on the history of the proposed Code in 1971 which support the view that § 2114 was intended to apply only to mail.

The 1948 Revisions may have been in error when they took § 320 away from the other postal offenses. As the District of Columbia Circuit ruled in *United States* v. *Spears*, *supra* the gravaman of § 2114 is an assault, not a robbery.

It was only when standing alone and out of context in the Robbery chapter that the language of § 2114 began to appear clear and unambiguous. As the Reid majority said:

> No Congressman could have supposed that in passing an amendment to that section proposed by the committee dealing with the postal service, he was creating a new crime with respect to government property generally.
>
> 517 F.2d at 957 n. 3a

CONCLUSION

For the reasons set forth above petitioners ask this Court to vacate the conviction as to Count III of the

Indictment and enter a judgment of acquittal as to that Count.

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No. 83-6061

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOSE AND FRANCISCO GARCIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether 18 U.S.C. 2114, which proscribes the assault and robbery of any person having lawful custody of any "mail matter or of any money or other property of the United States," is limited to assaults on postal employees and robbery of mail matter.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-6061

JOSE AND FRANCISCO GARCIA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 414-426) is reported at 718 F.2d 1528.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1983. The petition for a writ of certiorari was filed on January 6, 1984, and was granted on April 2, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2114 provides:

> Whoever assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United

States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs any such person of mail matter, or of any money, or other property of the United States, shall for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having custody of such mail, money, or other property of the United States, or puts his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted on multiple counts charging possession of counterfeit currency, in violation of 18 U.S.C. 474; conspiracy, in violation of 18 U.S.C. 371; stealing money of the United States, in violation of 18 U.S.C. 641; and robbing a Secret Service agent of money of the United States while putting his life in jeopardy through use of a dangerous weapon, in violation of 18 U.S.C. 2114. Jose Garcia was also convicted of resisting arrest by use of a deadly weapon, in violation of 18 U.S.C. 111.[1]

Each petitioner was sentenced to the mandatory 25-year term under 18 U.S.C. 2114 for robbing a government employee of money of the United States by placing his life in jeopardy through use of a dangerous weapon. In addition, Jose Garcia was sentenced to a consecutive 10-year term for resisting arrest, a consecutive five-year term for theft of gov-

[1] Francisco Garcia was acquitted on the charge of resisting arrest.

ernment property, and two concurrent five-year terms for conspiracy and possession of counterfeit currency. Francisco Garcia was sentenced to concurrent five-year terms for conspiracy, theft of government property, and possession of counterfeit currency, to run consecutively to the mandatory 25-year term. The court of appeals affirmed.

1. As summarized in the court of appeals' opinion (Pet. App. 416-419), the evidence at trial showed that on July 22, 1981, Secret Service Agent David Holmes, posing as a person interested in purchasing counterfeit money, was introduced by an informant to Ernesto Dominguez and petitioner Francisco Garcia. Holmes asked Garcia and Dominguez whether they had the counterfeit money with them, and Dominguez said it was in the trunk of a nearby car in which petitioner Jose Garcia was seated (*ibid.*; Tr. 11-14, 17). When the agent approached the vehicle, Jose Garcia responded that he was not going "to have anyone counting phony bills in this area" because the place was "sort of heated-up" (Pet. App. 417; Tr. 18). Petitioners then requested Holmes to show them the genuine currency with which he intended to make the purchase and Holmes displayed $1,800 of government money. The money was in a black pouch that had been concealed in his car. Tr. 16, 19, 76.

After Holmes returned the currency to his vehicle, Dominguez suggested that they complete the transaction at a more secure location, Bryant Park (Tr. 21). When the group reassembled at Bryant Park, Holmes was again asked to display his money (Tr. 41). Holmes refused and demanded first to see a sample of the counterfeit money; in response, Francisco Garcia gave him a counterfeit $50 bill to examine and told him that the group had $85,000 in counterfeit

currency to sell. Holmes then asked to see more (Pet. App. 417; Tr. 42-43).

At this, Jose Garcia assumed a "combat stance" and pointed a gun at Holmes. He screamed, "[e]nough of this bullshit, give me the money" (Tr. 43). Holmes then raised his arms in a predetermined distress signal and began moving toward his car, telling Jose Garcia that he was going to get the money (Tr. 43-44). Within seconds, agents who had observed Holmes' distress signal arrived and ordered Jose Garcia to drop his weapon. Garcia complied and one of the agents recovered the gun. While conducting a patdown search of Garcia's clothing, an agent found a counterfeit $100 bill (Pet. App. 417; Tr. 44, 88-91, 96-99).

As the agents converged on the scene, Francisco Garcia ran toward Holmes' car, removed the black leather pouch containing the government money, and attempted to escape on foot. However, he collided with a vehicle driven by one of the agents and dropped the pouch. A search of his person resulted in the discovery of a $50 counterfeit note. Pet. App. 418; Tr. 110-113, 117-118.

2. On appeal, petitioners claimed, inter alia, that their convictions under 18 U.S.C. 2114 were improper because that section proscribes only the assault and robbery of custodians of money or property belonging to the postal service. Expressly rejecting the contrary holdings of the Second and Ninth Circuits (see *United States* v. *Rivera*, 521 F.2d 125 (2d Cir. 1975); *United States* v. *Reid*, 517 F.2d 953 (2d Cir. 1975); *United States* v. *Fernandez*, 497 F.2d 730 (9th Cir. 1974)), the court held that "a postal nexus is not an essential element of a crime charged under section 2114" (Pet. App. 421). In particular, it reasoned (Pet. App. 419-420 (emphasis in original))

that "[t]o construe section 2114 as requiring proof of a 'postal nexus' defies the section's unambiguous wording that it encompasses the robbery of 'mail matter *or* any money or other property of the United States.'" The court also held that, even if resort to Section 2114's legislative history were necessary, the official reports of the House and Senate committees demonstrated that "both Committees understood its purpose to be 'to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of Government money.'" Pet. App. 420, quoting *United States* v. *Reid*, 517 F.2d at 967 (Mansfield, J., dissenting).

Finally, the court observed that "a plain language interpretation of section 2114 produces consistency among federal statutes imposing criminal punishment for robbery of a government employee" (Pet. App. 420). The court noted (*ibid.*) that several statutes—with varying penalties—proscribe the assault of federal officials and the robbery of government property. See, *e.g.*, 18 U.S.C. 111 (maximum 10-year penalty for assault of federal officer with dangerous weapon); 18 U.S.C. 2112 (maximum 15-year term for robbery of "any kind * * * of personal property belonging to the United States"). If Section 2114 is read "according to its plain and unequivocal language," all violent robberies of lawful custodians of government property—whether mail or other property—draw the same penalty (Pet. App. 420).

SUMMARY OF ARGUMENT

1. There is no dispute that the acts for which petitioners were convicted—robbery of a lawful custodian of government property that puts the victim's life in jeopardy by the use of a dangerous weapon—fall squarely within the plain language of 18 U.S.C.

2114. Accordingly, we submit that "this is a case in which the meaning of [the] statute may be determined by the admitted[ly] old-fashioned but nonetheless still entirely appropriate 'plain meaning' canon of statutory construction." *United States* v. *Clarke*, 445 U.S. 253, 254 (1980).

Section 2114 forbids all assaults on lawful custodians of "any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money or other property of the United States"; it also prohibits the robbery of such persons, and, when the victim's life is put in jeopardy during a robbery or attempted robbery, prescribes a mandatory 25-year sentence. Petitioners' conduct is clearly within the ambit of the statute.

Petitioners contend that Section 2114 is not applicable because the victim was not an employee of the Postal Service and the stolen property was not "mail matter." But the statutory language contradicts any such limitation. If Congress had intended to exclude robbery of non-postal government property, it surely would not have written the statute to include lawful custodians not only of "mail matter," but also of "money, or other property of the United States." It would instead have used words of limitation, as it has in other criminal statutes designed to relate only to postal matters. On the other hand, had Congress intended the statute to have the scope found by the court of appeals, it could not have expressed such an intent more clearly than does the actual statutory language it employed.

2. Where Congress has spoken so clearly, the words of the statute should be dispositive. We need not rely solely on the plain meaning, however, because the courts of appeals' construction is also supported by the legislative history. Prior to 1935 the section now codified at 18 U.S.C. 2114 referred to assaults on "any person having lawful charge, control or custody of any mail matter, with intent to rob, steal or purloin such mail matter." It was pointed out to Congress, however, that this language created an undesirable disparity. Whereas "[a]ssaults upon custodians of mail matter are punishable [by] 25 years imprisonment if the custodian is wounded or his life is put in jeopardy by the use of a dangerous weapon," in a case where the victim was the "custodian of Government funds (not mail) the maximum punishment that can be imposed is imprisonment for not more than 10 years and a fine of $5,000." S. Rep. 1440, 74th Cong., 1st Sess. 1-2 (1935). It was to remedy this situation that Section 2114 was amended to its present form.

The reports of the House and Senate Committees both confirm that the amendment was intended to protect all lawful custodians of government property. Both reports speak in this broad language and contain no suggestion that coverage was to be restricted to postal employees.

In the face of this conclusive legislative history, petitioners point only to two brief comments from the floor debates. The first remark on which they rely focused only on consistency of language in the amendment concerning its application to both foreign and domestic mail; it had nothing to do with the issue before the Court. The second remark, although containing a passing comment seemingly supportive of petitioners' argument, was directed solely at criticism of the statute's mandatory penalty provision.

It was not intended as a comprehensive statement of the amendment's substantive reach. But even if it were, such remarks during floor debate cannot "detract from the plain thrust of [the] committee report[s]," *Zuber* v. *Allen*, 396 U.S. 168, 186 (1969), because such reports are "more authoritative" than views of individual members, *United States* v. *O'Brien*, 391 U.S. 367, 385-386 (1968).

Ultimately, the few snippets petitioners cite from the floor debates provide no basis for rejecting the statutory language as the best indication of congressional intent.

3. Our reading of Section 2114 is not only consistent with its express language, but also fits harmoniously into the fabric of federal criminal statutes. It provides a uniform punishment for all life-threatening assaults with intent to rob government officials. Punishment should not turn—as it would under petitioners' construction—on the fortuity whether the victim is a postal employee or the government property is mail matter.

4. Because no ambiguity exists on the face of the statute, because our interpretation fits comfortably into the structure of the federal criminal law, and because no serious question is raised by the legislative history, the "rule of lenity" petitioners urge has no application here. Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961).

ARGUMENT

A VIOLATION OF 18 U.S.C. 2114, PROHIBITING ASSAULTS ON PERSONS HAVING LAWFUL CUSTODY OF ANY MAIL MATTER OR OF ANY MONEY OR PROPERTY OF THE UNITED STATES, DOES NOT REQUIRE PROOF OF A POSTAL NEXUS

In this case, "[t]he plain language of the statute * * * is sufficient to resolve the question presented" (*United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984), slip op. 6).

The only question before this Court is whether 18 U.S.C. 2114, which forbids the assault or robbery of any person having lawful charge, control or custody of any mail matter or of any money or property of the United States, is limited to instances where postal employees are victimized, or whether it embraces such offenses against all lawful custodians of government money or property as well. Although acknowledging that on its face Section 2114 contains no such limitation, the Second and Ninth Circuits have held that the statute applies exclusively to offenses having some "postal nexus" or connection with the mails. See *United States* v. *Rivera*, 521 F.2d 125, 127 (2d Cir. 1975); *United States* v. *Reid*, 517 F.2d 953, 956-957 (2d Cir. 1975); *United States* v. *Rivera*, 513 F.2d 519, 531-532 (2d Cir. 1975); *United States* v. *Fernandez*, 497 F.2d 730, 739-740 (9th Cir. 1974). In the instant case, the Eleventh Circuit disagreed, holding that a construction of Section 2114 "as requiring proof of a 'postal nexus' defies the section's unambiguous wording that it encompasses the robbery of 'mail matter *or* any money or property of the United States'" (Pet. App. 419-420 (emphasis in the original; citation omitted)). See also *United States* v. *Spears*, 449 F.2d 946, 953

(D.C. Cir. 1971) (statute, as amended, includes money and other property of the United States within its coverage).

It is our submission that the decision below is correct. The construction of Section 2114 adopted by the Second and Ninth Circuits not only "defies the section's unambiguous wording" (Pet. App. 419), it derives, at most, only limited support from the Section's brief legislative history.[2]

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[2] As petitioner observes (Br. 11), in *Hanahan* v. *United States*, 414 U.S. 807 (1973), we conceded that Section 2114 was intended to embrace only postal-related crimes. In that case, Hanahan agreed that his conduct violated another statutory provision, 18 U.S.C. 2112. U.S. Memo at 3-4, *Hanahan* v. *United States, supra.* Accordingly, the government viewed the case as "one involving an erroneous citation in the indictment" and suggested that "[p]etitioner's conviction is in all respects valid * * * except that he should have been sentenced in accordance with Section 2112, which carries a maximum term of fifteen years, as opposed to the term of 25 years under 18 U.S.C. 2114" (*id.* at 4). On the basis of that concession, the Court granted the petition, vacated the judgment of the court of appeals, and remanded the case for reconsideration in light of the Solicitor General's suggestion (414 U.S. 807 (1973)).

Particularly in view of the Court's recent and repeated pronouncements that, in the absence of clearly-expressed legislative history to the contrary, the unambiguous language of a statute conclusively establishes its scope (see pages 12, 15-16, *infra*), we believe that the concession in *Hanahan* was unwarranted and that the contrary holding of the court below is correct. Moreover, unlike *Hanahan*, petitioner has not acknowledged that his conviction would be valid under Section 2112 (cf. Pet. Br. 23-24), and in some cases the resentencing option suggested by the government in *Hanahan* would not be available. See *United States* v. *Rivera*, 513 F.2d at 532-533. In any event, the fact that the government has previously taken the position that Section 2114 applies only to postal-related offenses does not preclude it from urging a more expansive

Moreover, if an interpretation that limits the applicability of Section 2114 to offenses with a postal nexus is permitted to stand, the amount of protection afforded custodians of government property against robbery or violent assaults will vary on an arbitrary basis—whether the property is in some way related to the postal service. Under petitioners' interpretation, the criminal code would subject those who commit violent robbery or attempted robbery of custodians of postal property to a mandatory 25 year term, while at the same time subjecting those who successfully complete the violent robbery of government property from non-postal employees to a maximum penalty of 15 years under 18 U.S.C. 2112 or to a 10-year term if the offense was charged as an as-

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interpretation of the statute now. See *Barrett* v. *United States*, 423 U.S. 212, 222 (1976); cf. *NLRB* v. *Local Union No. 3*, 434 U.S. 335, 351 (1978) ("[a]n administrative agency is not disqualified from changing its mind" concerning the construction of a statute). In *Young* v. *United States*, 315 U.S. 257, 258-259 (1942), the Court observed that "a confession [of error by the government] does not relieve this Court of the performance of the judicial function. * * * [O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties." Cf. *Mariscal* v. *United States*, 449 U.S. 405, 406-407 (1981) (Rehnquist, J., dissenting).

We note also that the concession in *Hanahan* was premised on the belief that "[w]ith one exception, *United States* v. *O'Neil*, 436 F.2d 571 (C.A. 9) * * *, the statute has been used to prosecute only postal related offenses." U.S. Memo at 4, *Hanahan* v. *United States, supra.* Further research indicates, however, that such was not the case. In both *United States* v. *Sherman*, 421 F.2d 198 (4th Cir.), cert. denied, 398 U.S. 914 (1970), and *Peek* v. *United States*, 321 F.2d 934 (9th Cir. 1963), assaults on military personnel were successfully prosecuted under Section 2114.

sault with a dangerous weapon under 18 U.S.C. 111. Congress intended no such incongruous results.

A. Section 2114, On Its Face, Is Not Limited To Assaults On Custodians Of Postal Property

As this Court repeatedly has emphasized, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' *United States* v. *Turkette*, 452 U.S. 576, 580 (1981)." *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4.[3] Section 2114 is not even slightly ambiguous. It broadly forbids assaults on "any person having lawful charge, control or custody of any mail matter, or of any money or other property of the United States" and robbery of "any such person of mail matter, or of any money or other property of the United States." The language of the statute plainly is not limited to robbery of mail matter or assault upon postal employees. Rather, it proscribes the assault or robbery of "any person" having lawful custody of government property, and the covered property is not limited to "mail matter" but embraces "money or other property of the United States" as well.

Giving the words used by Congress "their ordinary * * * common meaning" (*Perrin* v. *United States*,

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[3] See also *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7; *Albernaz* v. *United States*, 450 U.S. 333, 336 (1981); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981); *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *United States* v. *Apfelbaum*, 445 U.S. 115, 121 (1980); *Lewis* v. *United States*, 445 U.S. 55, 60 (1980); *United States* v. *Oregon*, 366 U.S. 643, 648 (1961).

444 U.S. 37, 42 (1979)), it is clear that petitioners robbed a lawful custodian of government property. Moreover, in doing so they placed his life in jeopardy using a dangerous weapon, thus triggering the statute's mandatory 25-year term of imprisonment. Although petitioners argue that the statute should be narrowed to exclude assaults and robberies of non-postal employees, "[n]othing on the face of the statute supports this reading of it." *United States* v. *Naftalin*, 441 U.S. 768, 772 (1979). See *Bell* v. *United States*, No. 82-5119 (June 13, 1983), slip op. 5; *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 8 (quoting *Lewis* v. *United States*, 445 U.S. 55, 60 (1980), and *United States* v. *Culbert*, 435 U.S. 371, 373 (1978)).

Petitioners do not appear to challenge the natural reading of the statutory language other than to suggest (Br. 16 n.4, 20) that the use of the disjunctive ("mail matter or * * * any money or property of the United States") somehow introduces a measure of uncertainty. This unexplained contention is difficult to fathom. This Court stated in *United States* v. *Naftalin*, 441 U.S. at 774 (footnotes omitted):

> As is indicated by the use of * * * the conjunction "or" at the end of the first two [subsections], each subsection proscribes a distinct category of misconduct. Each succeeding prohibition is meant to cover additional kinds of illegalities —not to narrow the reach of the prior sections. See *United States* v. *Birrell*, 266 F. Supp. 539, 542-543 (SDNY 1967). There is, therefore, "no warrant for narrowing alternative provisions which the legislature has adopted with the pur-

> pose of affording added safeguards." *United States* v. *Gilliland*, 312 U.S. 86, 93 (1941).

See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979), quoting *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 739-740 (1970) ("[c]anons of construction ordinarily suggest that terms connected by [the] disjunctive be given separate meanings"). In a criminal statute the use of a disjunctive provides a clear indication that it can be violated by alternative means. See Pet. App. 420; *United States* v. *Lane*, 464 F.2d 593, 595 (8th Cir.), cert. denied, 409 U.S. 876 (1972); see also *United States* v. *Snider*, 502 F.2d 645, 655 (4th Cir. 1974). Because its prohibitions are written in the disjunctive, Section 2114 must be read to prohibit assaults or robberies of the custodians either of "mail matter" or, alternatively, of "money or other property of the United States." As the court below observed (Pet. App. 420):

> [T]he specific use of the disjunctive "or" after the comma [following the phrase "mail matter" and before the phrase "any money or other property of the United States"] demonstrates that Congress intended section 2114 to apply not only to robbery of "mail matter" but to money or other property held by an authorized person.

The "strained construction" of the statute advanced by petitioners, which limits its scope to offenses against custodians of mail matter, "would have [the Court] ignore the disjunctive 'or' and rob the term [other] 'property' [of the United States] of its independent and ordinary significance." *Reiter* v. *Sonotone Corp.*, 442 U.S. at 338-339.

Petitioners' second challenge to the statute's plain meaning is that the words Congress selected were not faithful to its intent. We deal below with petitioners' discussion of the legislative history (pages 18-30, *infra*). For the moment we need observe only that petitioners' argument proceeds from the mistaken premise that even if the statutory language leaves no room for doubt, the legislative history may be employed as a tool for generating uncertainty. Such an inverted approach to statutory construction is contrary to this Court's teaching that we must "'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used [in the statute],' *Richards* v. *United States*, 369 U.S. 1, 9 (1962)." *Russello* v. *United States*, slip op. 4; *United States* v. *Rodgers*, No. 83-620 (Apr. 30, 1984), slip op. 4. This is so, not because the statutory language is the sole source for ascertaining the legislative purpose, but because the actual wording on which both houses of Congress agreed is "the most reliable evidence" of legislative intent. *United States* v. *Turkette*, 452 U.S. at 593. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980) (this Court has "historically assumed that Congress intended what it enacted").[4] Accordingly, where "[n]othing on the

[4] Where, as in this case, the language of the statute in question is clear and unequivocal there is no need to resort to its legislative history. *United States* v. *Oregon*, 366 U.S. 643, 648 (1961); see, *e.g.*, *Ex parte Collett*, 337 U.S. 55, 61 (1949); *Helvering* v. *City Bank Co.*, 296 U.S. 85, 89 (1935); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83 (1932); see also *Rubin* v. *United States*, 449 U.S. at 430. The Court has stated (*Caminetti* v. *United States*, 242 U.S. 470, 490 (1917)):

> * * * when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or

face of the statute suggests a congressional intent to limit its coverage'" (*Dickerson* v. *New Banner Institute, Inc.*, slip op. 8, quoting *Lewis* v. *United States*, 445 U.S. at 60, and *United States* v. *Culbert*, 435 U.S. at 373), there is no need to go further in determining the statute's scope. Thus, "[t]he short answer [to petitioners' argument] is that Congress did not write the statute that way." *Russello* v. *United States*, slip op. 7, quoting *United States* v. *Naftalin*, 441 U.S. at 773.

Indeed, had Congress intended to limit Section 2114 to postal-related crimes, it surely knew how to say so. As Judge Mansfield noted in his dissent in *United States* v. *Reid*, 517 F.2d at 969, Congress has repeatedly enacted laws limited in their scope to "mail," "letters," or "packets," 18 U.S.C. 1693, 1694, 1695, 1696, 1698, 1700, 1701, 1703; a "post office or any authorized depository for mail matter," 18

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reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

Although there is no "rule of law" that forbids recourse to other aids to construction, see, *e.g.*, *United States* v. *American Trucking Associations*, 310 U.S. 534, 543-544 (1940); 2A C. Sands, *Sutherland Statutory Construction* § 48.01, at 182 (4th ed. 1973), "[w]hen the terms of a statute are unambiguous, our inquiry comes to an end, except 'in rare and exceptional circumstances.'" *Howe* v. *Smith*, 452 U.S. 473, 483 (1981) (quoting *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978), and *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930)). Here, it assuredly cannot be said that the "clearly expressed legislative intent" (*Russello* v. *United States*, slip op. 4) of Section 2114 is so contrary to its unambiguous language as to require that its plain meaning be disregarded (see page 30, *infra*).

U.S.C. 1702; a "letter box," "mail receptacle" or "authorized depository for mail matter," 18 U.S.C. 1706; "property used by the Post Office Department," 18 U.S.C. 1707; "postal funds," 18 U.S.C. 1711; a "letter or mail carrier," 18 U.S.C. 1702; and a "postmaster" or "Postal Service Employee," 18 U.S.C. 1709.

If Congress had, likewise, intended to limit the scope of Section 2114 as petitioners propose, it need simply have added the phrase "of the Post Office Department" after the phrase "any money or other property," or substituted the term "postal employee" for the phrase "any person."[8] See *United States* v. *Yermian*, No. 83-346 (June 27, 1984), slip op. 9-10; *United States* v. *Turkette*, 452 U.S. at 581. Instead, however, it selected language that broadly extended its reach to assaults or robberies of anyone who is the custodian of "any money or other property of the

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[8] Petitioners' effort to inject a "postal nexus" element points up a fundamental inconsistency in their interpretation of Section 2114. Thus, they appear to argue that the postal nexus is satisfied where the victim is an employee of the Postal Service or where a non-postal employee is robbed of mail matter. But this construction would mean that the application of the statutory phrase "money or other property of the United States" would vary from case to case with no consistency: *e.g.*, "money or other property" would include currency if stolen from a postal worker, but not from a Secret Service agent. Petitioners' approach would also burden the phrase "any person having lawful charge, control, or custody" with a similar inconsistency: *e.g.* a Secret Service agent would be such a legal custodian if he was robbed of "mail matter," but not if he was robbed of "money or other property of the United States."

On the other hand, the decision of the court of appeals avoids these anomalies and promotes the consistency that is apparent on the face of the statute.

United States." It is beyond question that, by using a pistol in an effort to rob Agent Holmes of money belonging to the United States, petitioners committed an act falling squarely within this unambiguous language and that the terms of the statute fully apprised them that such conduct was prohibited.

B. The Legislative History Does Not Support An Interpretation Of Section 2114 That Is Contrary To Its Plain Language

Petitioners do not seriously dispute that Section 2114 literally prohibits assaults not only upon custodians of mail matter but upon the custodians of any other money or property of the United States as well (see Br. 16 n.4). They argue instead that the legislative history does not demonstrate that Congress intended the statute to embrace non-postal crimes. Even if that were the case, the silence of the legislative history would not alter the plain meaning of the terms used by Congress. As this Court noted in *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980):

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.[6]

If the legislative history of a statute unequivocally demonstrated an intent contrary to the ordinary meaning of the statutory language, a difficult question of construction would be presented, and a refusal to construe the statute literally might well be justified. Here, however, as Judge Mansfield noted in his dissent in *United States* v. *Reid*, 517 F.2d at 969, if anything, the pertinent legislative history "reinforces the statute's plain, unequivocal language."

1. Section 2114 had its origin in the Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232, prohibiting larceny of the mail and robbery of the mail from a carrier, and an amendment to that statute that prohibited attempts to rob a mail carrier by assault with a dangerous weapon. Act of Mar. 2, 1799, ch. 43, § 15, 1 Stat. 736; see *United States* v. *Spears*, 449 F.2d 946, 950-952 (D.C. Cir. 1971).[7] Following codification of the entire United States Penal Code in 1909, the statute, which was contained in the section of the Criminal Code entitled "Offenses Against Postal Service," read as follows:

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[6] See *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980) ("It is not necessary for Congress in its committee reports to identify all of the 'weeds' which are being excised from the garden.").

[7] The 1799 Act provided (§ 15, 1 Stat. 736):

> [I]f any person shall rob any carrier of the mail of the United States, or other person entrusted therewith, of such mail, or of part thereof, such offender or offenders shall, on conviction, be publicly whipped * * * and be imprisoned not exceeding ten years; and if convicted a second time of a like offence, he or they shall suffer death: or if in effecting such robbery of the mail, the first time, the offender much [sic] wound the person having custody thereof, or put his life in jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death. And if any person shall attempt to rob the mail of the United States, by falling upon the person having custody thereof, shooting at him or his horses, or threatening him with dangerous weapons, and the robbery is not effected, every such offender, on conviction thereof, shall be punished by whipping, not exceeding thirty lashes, or with imprisonment, not exceeding two years, or with both * * *.

> Whoever shall assault any person having lawful charge, control or custody of any mail matter with intent to rob, steal or purloin such mail matter or any part thereof or shall rob any such person of such mail or any part thereof, shall for a first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery, he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

Act of Mar. 4, 1909, ch. 321, § 197, 35 Stat. 1126. See 18 U.S.C. (Supp. V 1939) 320. As did its precursors, the statute proscribed assaults or robbery only of persons having "charge, control or custody of any mail matter."

That prohibition was broadened to its present form in 1935. On February 20 of that year the Postmaster General wrote a letter to the Chairman of the House Committee on the Post Office and Post Roads. See S. Rep. 1440, 74th Cong., 1st Sess. 1-2 (1935). The letter observed:

> Assaults upon custodians of mail matter are punishable under section 197 of the Federal Penal Code (18 U.S.C. 320), which provides a penalty of 25 years' imprisonment if the custodian is wounded or his life is put in jeopardy by the use of a dangerous weapon. If the person assaulted is a custodian of Government funds (not mail) the maximum punishment that can be imposed is imprisonment for not more than 10 years and a fine of not more than $5,000; and no penalty is provided for attempts to commit such crimes. Recent years have witnessed a substantial increase in crimes of the latter type

> and it is believed that section 197 of the Penal Code should be amended so as to bring within its provisions the crime of robbing or attempting to rob custodians of Government moneys.

As a result of this communication and the recommendations of the House and Senate Post Office Committees, Congress amended the statute to its present form by adding the phrase "or of any money or other property of the United States" after the words "any mail matter." See Act of Aug. 26, 1935, ch. 694, 49 Stat. 867.

Although the legislation was initiated at the request of the Postmaster General, and considered by both the House and Senate Post Office Committees, neither the initiating request nor the committee reports contain any suggestion that the amendment was limited to postal employees or to custodians of money or property connected with the mails. To the contrary, the Postmaster General's letter voiced concern that, whereas assaults upon the custodians of mail matter by means of a dangerous weapon or which resulted in injury or a threat to life carried a mandatory 25 year sentence, similar assaults upon the custodians of government funds not connected with the mail were subject to a maximum sentence of only ten years. He therefore recommended without qualification that "the Penal Code should be amended so as to bring within its provisions the crime of robbing or attempting to rob custodians of government moneys."

The bill was described in similar terms by the House committee (as legislation "Safeguarding Custodians of Government Moneys and Property," H.R. Rep. 582, 74th Cong. 1st Sess. 1 (1935)), and in the Senate report (as legislation "Providing for Punish-

ment for the Crime of Robbing or Attempting to Rob Custodians of Government Moneys or Property." S. Rep. 1440, *supra*, at 1). Both reports quoted verbatim the Postmaster General's letter and, using identical language, explained that "[t]he purpose of the pending bill is to bring within the provisions of the Penal Code the crime of robbing or attempting to rob custodians of Government moneys." H.R. Rep. 582, *supra*, at 1; S. Rep. 1440, *supra*, at 1. When the amendment was passed by Congress, it captioned the legislation: "An Act [p]roviding for punishment for the crime of robbing or attempting to rob custodians of Government moneys or property" (see 49 Stat. 867).

These sources provide authoritative pronouncements of congressional intent to protect all custodians of government money or property, by making "an assault upon *any* custodian of *any* government property • • • equally punishable," *United States* v. *Reid*, 517 F.2d at 970 (Mansfield, J., dissenting; emphasis in original). In contrast, the cramped reading of the statute proposed by petitioners would frustrate the objective expressed in both committee reports. See H.R. Rep. 582, *supra*, at 1.[8]

[8] In his majority opinion in *United States* v. *Reid*, *supra*, Judge Friendly offers two further comments on the legislative history. We submit that neither is persuasive. First, Judge Friendly notes (517 F.2d at 957 n.3a) that "the 1935 amendment was to a statute which stood in the chapter of the Criminal Code dealing with offenses against the postal service." From this he concluded (*ibid.*) that "[n]o Congressman could have supposed that, in passing an amendment to that section proposed by the Postmaster General and recommended by the committees dealing with the postal service, he was creating a new crime with respect to government property generally." To the contrary, where the proposed language does not even hint at a "postal nexus" limitation and the committee reports are just as broad as the amendment's plain meaning, it is far more likely that members of Congress looked at the language on which they were voting than at the caption of the chapter in which it was contained. Indeed, given the breadth of the language, one can state with greater assurance that no congressman could have supposed that in passing an amendment covering all lawful custodians of money or other Government property he was, without so stating, limiting his action to postal crimes. See *Albernaz* v. *United States*, 450 U.S. at 342: "It is not a function of this Court to presume that 'Congress was unaware of what it accomplished . . . .'" (quoting *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 179). See also page 30 n.13, *infra*.

Judge Friendly also adverted (517 F.2d at 957-958 n.5) to subsequent commentaries that refer to Section 2114 as dealing with the mail (*Final Report of the National Commission on Reform of Federal Criminal Laws* § 201 comment at 15 (1971); *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess., Pt. 1, at 21, 36 (1971)). Section 2114 does, of course, "deal with the mails," but neither of these sources contradicts the proposition that its coverage extends further. In any event, " 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 117-118 (quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960)); see *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282 (1947).

2. Disregarding the broad language contained in the Postmaster General's letter and the committee reports of both houses, petitioners rely (Br. 20-21) exclusively upon two remarks by a single congressman, Donald Dobbins, during the floor debates to support their view that the amendment was intended to cover assaults or robberies only of custodians of

postal moneys or property. When these comments are read in context, however, it is clear that Representative Dobbins was responding to specific criticisms unrelated to the issue before this Court, and in neither instance was he offering a comprehensive description of the statute's scope.

The first remark by Representative Dobbins answered Representative Wolcott's objection that the draft amendment's phraseology was inconsistent. Representative Wolcott pointed out that the portion of the draft addressing the assailant's intent had been amended to read "any mail matter *or of any* money or property of the United States," whereas other portions omitted the words "of any" and referred only to "mail matter, money or other property of the United States" (79 Cong. Rec. 7875 (1935) (emphasis added)). He suggested that, for the sake of consistency, the words "or of any" should precede all references to "money or property of the United States." *Ibid.* Representative Dobbins, a member of the House Committee on the Post Office and Post Roads,[9] first responded (*ibid.*) that no inconsistency

[9] The legislative history of the statute does not show, as petitioners now maintain (Br. 20), that Representative Dobbins was floor manager of the legislation. In any event, even the fact that he was a member of the committee responsible for formulating the legislation would not provide a basis for allowing his comments to override the committee report (see pages 21-22, *supra*, and pages 28-30, *infra*) and the clear and unambiguous language of the statute. See *Railroad Commission* v. *Chicago B. & Q. R.R.*, 257 U.S. 563, 589 (1922); 2A C. Sands, *Sutherland's Statutory Construction* § 48.14, at 220 (4th ed. 1973); see also *Weinberger* v. *Rossi*, 456 U.S. 25, 35 n.15 (1982) ("[t]he contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history"); *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 118 (same); *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979)

existed because the bill's use of the word "such" effectively incorporated the same antecedent throughout. He added (*ibid.*):

> The trouble with the language as originally written "custody of any mail matter, money, or other property of the United States" is that it might limit the offense to mail matter of the United States, whereas it is designed to include within the protection of the section all mail matter, whether it belongs to the United States or is mail belonging to a private citizen and is temporarily in the custody of the United States while being in the United States mails.

Following this colloquy, Representative Dobbins stated (*ibid.*) that he had no objection to the Wolcott suggestion, and, upon the House Post Office Committee's recommendation, the section's introductory phrase was amended by addition of the words "or of any" preceding the word "money." See H.R. Rep. 582, *supra*, at 1-2; 79 Cong. Rec. 9380 (1935).

This sequence of events belies petitioners' contention (Br. 20) that the term "or" was "only used because of the Committee's desire to increase the scope of the original bill to include foreign mail." To the contrary, even prior to the committee's amendment, the bill was written in the disjunctive and contemplated three distinct categories of protected government property: "mail matter," "money" and "other property of the United States." The "or of any" language was added in one clause before the

(same). In this case, if the sole purpose of the 1935 amendment was to extend its protection to non-mail *postal* property, it would have been a simple matter for the committee of which Representative Dobbins was a member to have so limited it.

word "money," at Representative Wolcott's suggestion, merely to attain consistency with another portion of the draft legislation and not to achieve any substantive change. Nothing in Representative Dobbins' remarks suggests that he was addressing the scope of the terms "money" and "other property of the United States". Rather, he was commenting solely on the question whether the term "mail matter" embraced not only domestic mail but also mail belonging to a foreign citizen that is temporarily in the custody of the postal service. Accordingly, these remarks of Representative Dobbins are totally irrelevant to the issues in this case.

The second statement upon which petitioners rely occurred during further debate on May 24, 1935, when Representatives Wolcott and Truax objected to the provision of the bill imposing a mandatory 25-year sentence for wounding a custodian of government property or using a weapon in committing an enumerated offense (79 Cong. Rec. 8205). Responding to a rhetorical inquiry by Representative Truax why such a penalty should not also apply "to the burglar who enters a person's home" (*ibid.*), Representative Wolcott stated (*ibid.* (emphasis added)):

> I doubt whether the Federal Government would have jurisdiction to enact legislation making it a felony to enter a person's home for the purpose of committing burglary or any other offense. *This bill is confined to assaults on Federal law-enforcement officers.* For that reason, I have no objection to it. I do not want to see them federalize all the criminal laws of the States and this bill does not do it; it merely amends existing law with respect to assault with intent to commit robbery.

Representative Dobbins then discussed the discrete objection to the mandatory nature of the penalty (*ibid.*):

> Mr. Speaker, the gentleman from Ohio objects to the 25-year penalty provided in this bill. The penalty clause is not new legislation. If this bill is not passed, the statute will still contain the mandatory 25-year penalty.
>
> The only purpose of the pending bill is to extend the protection of the present law to property of the United States in the custody of its postal officials, the same as it now extends that protection to mail matter in the custody of postal officials. Aside from that, it makes no change in the law. It just includes property of the United States in addition to mail matter which is protected; and let me say there are many custodians of postal stations who have a great amount of money in their custody but little mail; for instance, in those substations where money orders are sold. If a bandit attacks those employees seeking that money, there is no way to prosecute the bandit under the present law, but if he is merely after a postal card or a letter he can be prosecuted.

Although Representative Dobbins' observation about the "purpose of the pending bill" might appear to support petitioners' claim that the legislation was intended to embrace only postal matter,[10] it cannot carry the day for them in the face of the numerous

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[10] Both the courts in *United States* v. *Rivera*, 513 F.2d at 531-532 n.18, and in *United States* v. *Fernandez*, 497 F.2d at 740, placed heavy reliance upon Representative Dobbins' statement in holding that Section 2114 applies only to property having some nexus with the Postal Service.

and weighty considerations supporting the court of appeals' decision.

Viewed in its proper context, Representative Dobbins' remarks do not sustain petitioners' broad conclusions. The statement was, after all, not made for the purpose of explicating the scope of the statute, but rather to defend its penalty provisions.[11] Moreover, even if those comments during the floor debates are construed as supporting petitioners' view of the statute, there is no occasion for concluding that Congress's desire to protect postal workers was its *sole* purpose. See, *e.g.*, *United States* v. *Naftalin*, 441 U.S. at 774-776; *United States* v. *Culbert*, 435 U.S. at 377.

This Court has often noted that a statement made during floor debates, even by the floor manager of the legislation, reflects at best only the understanding of an individual member and "is not impressive legislative history." *Zuber* v. *Allen*, 396 U.S. 168, 186-187 (1969).[12] By contrast, "[a] committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Ibid.* As Justice Jackson explained in his concurrence in *Schwegmann Bros.* v. *Calvert Corporation*, 341 U.S. 384, 395-396 (1951):

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond committee reports, which presumably are well considered and carefully prepared. * * *. [T]o select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions.

See *United States* v. *O'Brien*, 391 U.S. 367, 385-386 (1968) (in examining legislative purpose, committee reports are "more authoritative" than views of individual committee members during floor debates); compare *Simpson* v. *United States*, 435 U.S. 6, 13-14 (1978) (remarks from sponsor of floor amendment entitled to weight because the statement was in accord with the legislative rationale underlying the statute at issue; because the amendment was introduced on the floor of the House, there were no relevant passages regarding that portion of the statute in the congressional reports).

Here, the authoritative committee reports of both houses, including the House committee of which Representative Dobbins was a member, were contrary to his somewhat offhand comment concerning the scope of the amendment. Particularly because his statement was made in response to criticism concerning the statute's sentencing provision rather during a colloquy focusing upon its scope, it is plainly not the sort of "extensive and thoughtful debate [such as would] detract from the plain thrust of [the] committee report[s] in this instance" (*Zuber* v. *Allen*,

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[11] Representative Wolcott had expressed his criticism in these terms (79 Cong. Rec. 8205 (1935)): "I think it is a very bad way to leave legislation, making it mandatory upon a judge to give a particular sentence, and no more and no less. If the committee wants it that way, however, I have no objection."

[12] In *Zuber* the Court minimized the significance of Senator Murphy's remarks concerning the purpose of the Agricultural Adjustment Act of 1937 despite the fact that he was floor manager of the legislation (396 U.S. at 203) (Black, J., dissenting) because, inter alia, they differed from the "plain thrust" of the committee report (*id.* at 186).

396 U.S. at 186). Indeed, the importance of Representative Dobbins' remarks is further diminished by the fact that, during the floor debate, Representative Wolcott expressed the substantially different view that the bill embraced assaults on all "Federal law enforcement officers" and "amends existing law with respect to assault with intent to commit robbery." 79 Cong. Rec. 8205 (1935).

In short, given the broad objective of the amendment articulated in both the committee reports and Representative Wolcott's remarks, Congressman Dobbins' contrary statement clearly does not constitute the type of compelling legislative history that is sufficient "to make plain the intent of Congress that the letter of the statute is not to prevail." *TVA* v. *Hill*, 437 U.S. 153, 187 n.33 (1978); see also *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 14 ("[t]o permit * * * clear statutory language to be materially altered by such colloquies, * * * would open the door to the inadvertent * * * undermining of the language * * * voted on by Congress and signed into law by the President"); *Russello* v. *United States*, slip op. 4.[13]

[13] It has been suggested (*Reid*, 517 F.2d at 957 & n.3a; see page 22 note 8, *supra*), that in 1935, Section 2114 was contained in the chapter of the Criminal Code dealing with the postal service and therefore, Congress intended to limit the statute to postal offenses. But, as noted in the *Reid* dissent (517 F.2d at 964), prior to its 1948 revision the Penal Code did not have any subdivisions classifying crimes in broad general terms such as embezzlement, theft, homicide and fraud. There was, therefore, simply no more general category in which the section, as amended in 1935, could have been placed. When the Penal Code was recodified in 1948, the statute was placed in a chapter designated "Robbery and Burglary" (18 U.S.C. (Supp. III 1950) 2111 *et seq.*) despite the fact that the code contained another chapter designated "Postal Service" (18 U.S.C. (Supp. III 1950) 1691 *et seq.*). Although the revisers' action "did not expand the meaning Congress had entertained in 1935" (*United States* v. *Reid*, 517 F.2d at 957), by the same token, it surely demonstrates that the earlier placement of the statute in the Section entitled "Offenses Against the Postal Service" is of no particular significance for ascertaining its scope.

C. A Construction Of Section 2114 That Requires Proof Of A "Postal Nexus" Would Result In An Unreasonable Disparity Between The Protection Afforded Custodians Of Postal Property And Custodians Of Other Government Money Or Property Not Connected With The Mails

A fundamental rule of statutory construction is that "[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible." *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 71 (1982); see 2A C. Sands, *Sutherland Statutory Construction* § 45.12, at 37 (4th ed. 1973). In this respect, as Judge Mansfield observed in his dissent in *United States* v. *Reid*, 517 F.2d at 970, reading Section 2114 according to its plain and unequivocal language establishes consistency in federal statutes dealing with crimes of violence against custodians of government property and protects all lawful custodians of such property on an equal basis without making arbitrary distinctions depending upon the character of the property involved.

Petitioners observe (Br. 19) that, at the time Section 2114 was amended to its present form, another statute (now codified at 18 U.S.C. 2112),[14] prohibited robbery of government property; they suggest that an amendment to Section 2114 embracing offenses against the custodians of non-postal government prop-

[14] 18 U.S.C. 2112 provides:

> Whoever robs another of any kind or description of personal property belonging to the United States, shall be imprisoned not more than fifteen years.

erty would therefore have been redundant.[15] The two statutes, however, are substantially different in the nature of the conduct prohibited; and, because of the disparity in potential sentences, they differ in the protection afforded the custodians of government property as well.

Section 2114 prohibits assault of the legal custodian of government property with intent to rob; it also prohibits robbery of such person; and, it authorizes an enhanced penalty for recidivists and for persons who commit robbery or attempted robbery if the defendant "wounds the person having custody" of government property "or puts his life in jeopardy by the use of a dangerous weapon." By contrast, Section 2112 prohibits only simple robbery of any person—whether a lawful custodian or not—"of any kind or description of personal property belonging to the United States."[16] Thus, Section 2112 affords pro-

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[15] Of course, if petitioners are correct then Section 2114 would have been redundant even for postal employees because Section 2112 already covered certain offenses against them. Clearly something more was intended in the amendment to Section 2114.

[16] It is apparent from the legislative history of Section 2112 that it was not intended by Congress to afford any specific protection against robbery to lawful custodians of government property such as Agent Holmes. Section 2112 had its genesis in the Act of Mar. 2, 1867, ch. 193, 14 Stat. 557. The original House version of the legislation, H.R. 604, 39th Cong., 2d Sess. (1867), was merely a bill defining and punishing "the robbery and larceny of United States securities and to punish the malicious obstruction of any railway on which are trains containing mail matter or other freight belonging to the Government." See Cong. Globe, 39th Cong., 2d Sess. 1246 (1867). The Senate, however, proposed amending the bill to read as follows (*id.* at 1225):

> That if any person shall rob another, lawfully in the custody thereof, of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, the person so offending shall, on conviction, be punished by fine not exceeding $5,000, or by imprisonment at hard labor not less than one nor more than ten years, or by both, at the discretion of the court.

Following objection to this amendment in the House (*id.* at 1246), a conference committee agreed to its adoption but with elimination of the phrase "lawfully in the custody thereof" (*id.* at 1758), and the bill was signed into law in that form (*id.* at 1977, 1982). Such action made clear that, in enacting the legislation, Congress did not intend to afford any particular protections to government employees. By contrast, Section 2114 was expressly enacted into law to protect against crimes of violence against any person having "lawful charge, control, or custody of any mail matter, *money, or other property of the United States,*" rather than merely to prevent misappropriation of the property itself. See H.R. Rep. 582, *supra*, at 1 (emphasis in original).

tection only for a consummated robbery, while Section 2114 provides additional protection from attempted robbery accompanied by an assault or use of a weapon. If Section 2114 were limited to postal-related crimes, there would be no particularized punishment for assaults on lawful custodians of other government property with intent to rob, or for life-threatening attempted robberies of such persons.[17]

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[17] It is true that assaults on certain government officials are prohibited by 18 U.S.C. 111, if the victim is among those enumerated in 18 U.S.C. 1114 (which now includes all employees of the Postal Service, but which in 1935 included only postal inspectors, see Pub. L. No. 90-449, 82 Stat. 611 *et seq.*). 18 U.S.C. 111 provides:

> **Assaulting, resisting, or impeding certain officers or employees**
>
> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account

Petitioners' contention, based on the overlap of other provisions, fails in any event because the application of Section 2114 to their conduct is unaffected by the fact that other federal criminal statutes may also apply. While Section 2114 complements the protection afforded and penalties authorized by other statutes, as this Court repeatedly has recognized, statutory overlap is neither unusual nor unfortunate. See *Edwards* v. *United States*, 312 U.S. 473, 484 (1941) ("[t]he two [statutes] can exist and be useful, side by side"); *United States* v. *Naftalin*, 441 U.S. at 777-778 ("[The defendant] is undoubtedly correct that the two Acts prohibit some of the same conduct * * *. [But that] certainly does not absolve [him] of guilt for the transactions which violated the statute under which he was convicted."); *SEC* v. *National Securities Inc.*, 393 U.S. 453, 468 (1969) ("The fact that there may well be some overlap is neither unusual nor unfortunate."); see generally *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979).

Moreover, as the court below observed (Pet. App. 420), if Section 2114 is read according to its plain and unequivocal language, it achieves consistency among federal criminal statutes. All violent robberies or attempted robberies of government employees, whether of mail or other government property, result in the same 25-year mandatory penalty. By

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of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

But even in cases where Section 111 is applicable, it provides no additional punishment where the assault was committed with intent to rob. Only Section 2114 addresses this point.

contrast, the interpretation proposed by petitioners results in a mandatory 25-year term for robberies or attempted violent robberies only of postal employees, while even successful robberies of other government workers would trigger only a maximum penalty of 15 years under 18 U.S.C. 2112, or 10 years if the offense is charged as an assault with a dangerous weapon under 18 U.S.C. 111.[18]

There is no suggestion in the statute's language or its legislative history that Congress intended such arbitrary distinctions. Rather, common sense impels the conclusion that, as plainly stated in the statute it enacted, Congress intended the amendment to Section 2114 to protect custodians of both postal and non-postal government property in like fashion.

D. The Rule Of Lenity Has No Application In The Absence Of Any Statutory Ambiguity

Because petitioners' construction of the statute does not comport with its plain meaning or legislative history, there is no basis for their contention (Br. 13-14) that the "rule of lenity" calls for Section 2114 to be restricted to postal-related crimes. See *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) ("The Court has emphasized that the 'touchstone' of the rule of lenity is 'statutory ambiguity.'"). The rule of lenity is not applicable unless there is a "grievous

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[18] It is of course possible that a defendant who uses a deadly weapon in a consummated robbery of a government official could be charged under both Sections 111 and 2112 and would face a maximum aggregated sentence of 25 years. But in that event the actual sentence would be left to the discretion of the trial judge and the term of imprisonment could be shorter than the 25 years mandated by Section 2114. Moreover, since Section 2112 applies only to consummated robberies, it does not include the crime of attempted robbery that is embraced by Section 2114.

ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)), such that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)). See *United States* v. *Yermian*, No. 83-346 (June 27, 1984), slip op. 6 n.7; *McElroy* v. *United States*, 455 U.S. 642, 658 (1982). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961). And, as the Court observed in *United States* v. *Moore*, 423 U.S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948) (brackets in original):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose . . . . Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

For the reasons we have discussed, there is no ambiguity here. Section 2114 fits harmoniously into the fabric of federal criminal law; it does not produce a result "so 'absurd or glaringly unjust'" (*United States* v. *Rodgers*, slip op. 9, quoting *Sorrells* v. *United States*, 287 U.S. 435, 450 (1932)) as to call in question Congress's intent; and its legislative

history does not reveal "'a clearly expressed legislative intent to the contrary.'" *Dickerson* v. *New Banner Institute*, slip op. 7 (quoting *United States* v. *Turkette*, 452 U.S. at 580, and *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. at 108). In short, it would be an unwarranted intrusion on the statutory scheme Congress enacted for Section 2114 to be limited as petitioners propose. See *Albernaz* v. *United States*, 450 U.S. at 342; *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. at 179; *United States* v. *Turkette*, 452 U.S. at 587 ("[t]here is no argument that Congress acted beyond its power * * *. That being the case, the courts are without authority to restrict the application of the statute"). See *United States* v. *Culbert*, 435 U.S. at 379-380.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 83-6061

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

JOSE GARCIA AND FRANCISCO GARCIA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF

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QUESTIONS PRESENTED

WHETHER A PROSECUTION UNDER 18 U.S.C. § 2114 REQUIRES A POSTAL NEXUS IN ORDER FOR A CONVICTION TO BE SUSTAINED.

A) WHETHER THE PLAIN MEANING DOCTRINE PROHIBITS REVIEW OF CONGRESSIONAL INTENT WHEN INTERPRETING 18 U.S.C. § 2114.

B) WHETHER CONGRESSIONAL INTENT REQUIRES A POSTAL NEXUS IN PROSECUTIONS OF 18 U.S.C. § 2114.

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REPLY BRIEF

ARGUMENT

THAT SECTION 2114 OF TITLE 18 REQUIRES A POSTAL NEXUS IN ORDER TO SUSTAIN A CONVICTION

The issue before the Court remains the interpretation of the scope of 18 U.S.C. § 2114 after an amendment in 1935. The statute had historically applied only to prosecutions for robberies of lawful custodians of mail matter. *See United States* v. *Spears,* 449 F.2d 946 (D.C. App. 1971). The antecedents of this statute extended back to 1792 and were enacted by Congress utilizing its power over the post office. *Id.* at 950. U.S. Const. art. 1, § 8, cl. 7. In 1935 Congress amended the

statute (then found in 18 U.S.C. § 320) to include robbing or attempting to rob lawful custodians of mail matter "or any money or other property of the United States."

A. The Plain Meaning Doctrine Does Not Operate As A Rule Of Exclusion To Prevent Review Of Legislative Intent, As Conceded By The Government

The Government contends that any inquiry into legislative history is foreclosed because the meaning of the added words are unambiguous. Invoking the so-called plain meaning doctrine, the Government asks this Court to adopt a mechanistic formula of statutory construction that precludes a consideration of the actual intent of Congress. Constantly beseeching the Court to apply the plain meaning doctrine as a rule of exclusion, the Government suddenly gracefully concedes the point. (Resp. Br. 16 n. 4).

B. A Plain Reading Of Section 2114 Reveals It Is Ambiguous

The Government then confesses a complete misunderstanding of Petitioners' argument. Part of this misunderstanding consists of the claim by the Government that their interpretation of the literal meaning of the amended statute is conceded by Petitioners. (Resp. Br. 18). In fact, the amended statute is totally ambiguous on its face.

The Government contends that the amended statute contains two categories of crime separated by the disjunctive "or". (Resp. Br. 12-14). What is missed by the Government is that under a "plain reading" of the statute, the conclusion is inescapable that there are two disjunctives separating three separate categories of crime: (1) mail matter, (2) money, (3) other property of the United States. There is nothing in the "plain meaning" of the statute that permits "money" to be further modified to mean "money of the United States." As a matter of fact, such a meaning would contradict the clear intent of Congress to include money held in the lawful custody of the Post Office, within the ambit of Section 2114. Also, such a reading would be more restrictive than the original statute. There is nothing strained about such an interpretation, considering the Government's apparent position that the first "or" means "or", but the second "or" means "and".

The meaning of the statute becomes more ambiguous when both "or's" are given the meaning normally applied to them. *See United States* v. *Naftalin,* 441 U.S. 768 (1978) and *United States* v. *Birrell,* 266 F. Supp. 539, 542-543 (S.D.N.Y. 1967), cited in Respondent's Brief at 13. In that event, each of the three categories should be able to stand alone. Category One and Three ("mail matter") and "other property of the United States") make good sense, but Category Two ("money") is absurd standing alone. The Congress would then have enacted a Federal robbery statute without any jurisdictional basis. Obviously, such ambiguity begs for clarification by judicial interpretation. It also gives credence to the complaints of the congressmen participating in the floor debates that the amended statute was horribly drafted. 79 Cong. Rec. 7875.

Now that ambiguity has been documented, the road is clear to begin the real business of judicial interpretation; the determination of legislative intent.

United States v. *Yermian*, 104 S. Ct. 2936, 2944 (1984) (Rehnquist dissent) citing *United States* v. *Fisher*, 2 Cranch [6 U.S.] 358, 386 (1805) (Marshall, C. J.).

C. Application Of The Rule Of Ejusdem Generis To The 1935 Amendment To Section 2114 Resolves Any Ambiguity And Confirms Congressional Intent To Include A Postal Nexus Requirement

There is one rule of statutory construction, which makes the amended statute completely unambiguous. This is the rule of *ejusdem generis*. Black's Law Dictionery (5th Ed. 1979) defines the rule:

> [W]here general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. [citations omitted].

Applying this canon of statutory construction to the amended Section 2114 provides the postal nexus intended by Congress. Ambiguity disappears and the "plain meaning" of the statute can no longer be evoked to stretch the scope of the statute to unheard of dimensions. Massive litigation is headed off instantly as Section 2114 settles down into what it was always intended to be: the Postal Robbery Statute.

The rule of *ejusdem generis* is not a technical exercise in semantics. It contains its own method of analysis. Sands, SUTHERLAND STATUTORY CONSTRUCTION, 4th Ed., Vol. 2A, § 47.17 et seq. Important to the analysis is the concept of the "class": "generalizations which associate items for a particular purpose

or treatment." *Id.* at 110. Essential to the determination of a class remains the intent of the legislature.

It was because in other cases, defendants neglected legislative intent in determining the scope of the applicable "class," that this Court has rejected this argument in the recent past. *Standefer* v. *United States*, 447 U.S. 10 (1979). *United States* v. *Powell*, 423 U.S. 87 (1975). *Cleveland* v. *United States*, 329 U.S. 14 (1946). *Gooch* v. *United States*, 297 U.S. 124 (1936). *United States* v. *Bitty*, 208 U.S. 393 (1907). When the manifest intent of Congress is at variance with a narrow construction of a statute using the rule of *ejusdem generis*, the above cases show the manifest purpose of Congress controls.

Despite the tendency of the Congress to apply broad purposes to the statutes analyzed above, an analysis of the legislative history of the 1935 Amendment does not reveal any broad purpose except the increased protection over the postal function. The "class" remains confined within the already wide variety of mail matter originally delineated in the statute. In essence, mail matter belongs to private individuals, not the post office. Surely, any money in the lawful custody of postal officials, coupled with property of the United States in their lawful custody, expands the areas protected by the statute without causing a widening of the scope to create absurd results. (See following section). In the instant case, the Court should follow the analysis offered by opinions in *United States* v. *Stever*, 222 U.S. 167 (1911), and *United States* v. *Chase*, 135 U.S. 255 (1889).

D. The Government's Interpretation That Congress Intended The Amended Section 2114 To Have A Wide Scope Would Lead To Absurd Results And Cause Problems In Subsequent Judicial Review

Future litigants will have a whole range of issues available to add to the congestion of the Federal appellate process if this Court accepts the Government's position in this case. For example, in the past, judicial interpretation focused on who could have "lawful charge, control, or custody" of mail matter. *See, Jones* v. *United States*, 72 F.2d 873 (7th Cir. 1934). *Randazzo* v. *United States*, 300 F. 794 (8th Cir. 1924). *United States* v. *Reeves*, 38 F. 404 (C.C.W.D. Texas 1889). Using postal regulations as a guide, the term had meaning, but give the statute the scope suggested by the Government, and more questions are raised than answered. Anyone from a confidential informant with heroin provided by the DEA for a reverse sting to a Government maintenance worker whose hammer is stolen at gunpoint could be considered a "lawful custodian" of "money or other property of the United States."

The jurisdictional basis of Section 2114 changes when the Government's construction prevails. The power to establish a postal system contained in the Constitution does not automatically extend to "money or other property of the United States," unless there is some implied limitation. Should there have been some legislative history concerning intent to invoke another power?

Should it be assumed, as the Government so appears, that no scienter is required for a conviction under this statute? In the instant case, neither of the petitioners had any knowledge that they were attempting to rob "lawful custodians of government money," until they were arrested. (*See* Statement of Facts in Pet. Br. 2-8). While this Court has eliminated scienter in Section 111 offenses (*United States* v. *Feola*, 420 U.S. 671 (1975)), query whether such a course of action is advisable when there is twenty-five year mandatory sentence at stake.

Finally, if the Government's position prevails, there would be an immediate loss of sentencing discretion by the Federal judiciary. By manipulating the charges, the Government could reduce the judiciary to rubber stamping its own sentencing decisions. Consider the potential application to undercover operations. (For instance, the case at bar). If a Federal law enforcement agency can plant money or drugs on an informant, allow him to infiltrate some alleged "bad guys," and hope someone gets greedy and tries a "rip-off," they could sustain a mandatory twenty-five year penalty.

Contrary to the Government's contention, under its interpretation, Section 2114 does not "fit harmoniously into the fabric of federal criminal law." (Resp. Br. 36). It could easily become the statute of choice for over-zealous prosecutors, swallowing whole 18 U.S.C. § 2112.

There is no defect in reasoning underlying the propriety of singling out postal employees or other authorized custodians of the mail for special protection. (Resp. Br. 11). Historically, letter carriers have travelled the roads of America unarmed. Surely Congress was more concerned with deterring violent attacks (even attempted robberies) of postal employees than usually armed Federal law enforcement officers.

Most importantly, application of the rule *ejusdem generis* to the interpretation of Section 2114 completely comports with the legislative history. The "snippets" which petitioners excised from the floor debates constitute the only clear expressions of Congress' intent. They were made by Congressman Dobbins, who was perhaps never ordained "floor manager," but whose job it was to steer Post Office legislation through the House of Representatives. *See* 79 Cong. Rec. 7874, for Dobbins leading the debate on another bill requested by the Post Office. The Government's contention that the issue before this Court was never discussed in Congress is without merit, and to the extent that it has merit, further discredits the Government's position in light of the strict construction of criminal statutes required by the Constitution.

CONCLUSION

For the reasons set forth above, Petitioners ask this Court to vacate the conviction as to Count III of the Indictment and enter a judgment of Acquittal as to that Count.

Respectfully submitted,

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